

The Feminist Negotiator's Dilemma

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ABSTRACT

This article challenges traditional approaches to gender difference in prescriptive negotiation analysis. Historically, dispute resolution scholars and practitioners analyzing the determinants of gender have either assumed or concluded that women and men negotiate differently, with so-called “women’s ways” being seen as less effective than “men’s ways” at achieving principled negotiation results. This position has led scholars to offer prescriptive negotiation advice that maps onto two forms of difference feminism: liberal feminist negotiation (translatable as “fix the woman”) and cultural feminist negotiation (translatable as “fix the system around the woman”). This article critiques difference feminist theory for its practical and political implications in principled negotiation. These criticisms suggest that difference feminist theory limits the range of negotiation tools accessible to everyone by reinscribing sex and gender stereotypes, and only allows room for feminist interventions based in minoritizing discourses of female/feminine bargaining identity at the expense of universalizing discourses of human activity. The article then offers an alternative based in postmodern feminism, “protean negotiation,” that aspires to dissolve fixed gender identities for the practical and political benefit of both women and men. This article concludes by suggesting that a form of the classic Negotiator’s Dilemma is reflected in the progressive politics of gender in negotiation where cultural feminism and postmodern feminism suggest a tension between ideological commitments to “identity” and “activity” respectively. These intuitions give rise to a struggle called the “Feminist Negotiator’s Dilemma,” and there may be no way to resolve it. The task for progressive politics should be to accept these competing imperatives and to negotiate their contradictions if feminists are to effectively understand, let alone resist, the limitations of gender difference in negotiation theory and practice.

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I. INTRODUCTION: NEGOTIATING DIFFERENCE

Negotiation was historically perceived to be a mercenary activity: each party takes a position, argues for it, and makes concessions to reach a compromise that maximizes the party's share of resources.¹ This perception has been mitigated by the growing acceptance and institutionalization of alternative dispute resolution ("ADR") based on Roger Fisher, William Ury, and Bruce Patton's ground-breaking manual, *Getting to YES: Negotiating Agreement Without Giving In*,² which proposes the "principled negotiation" model as an integrative alternative³ to the more adversarial, distributive

¹ Historically, the legal literature on negotiation described the bargaining process as a linear sequence of offers and counteroffers punctuated by concessions, bluffs, threats, and other tactical behaviors, leading to a negotiated agreement somewhere between the parties' original positions. This characterization is based in liberal economic theory, which suggests that the involved parties are rational, self-maximizing actors who share the same goals or values and bargain for the same "scarce" resources with a view to reaching a settlement predicated upon dividing those resources. However, the fundamental goal is maximizing victory—that is, increasing the likelihood that a lawyer's client will prevail and maximizing the amount that client receives upon prevailing. See generally MORTON DEUTSCH, *THE RESOLUTION OF CONFLICT* (1973); OTOMAR J. BARTOS, *PROCESS AND OUTCOME OF NEGOTIATIONS*, 3-4 (1974); Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669, 675-77 (1978); Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 226 (1982).

² ROGER FISHER, WILLIAM URY, & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (3d ed. 2011). Over the past three decades, there has been a surge of academic and popular interest in consensual dispute resolution as a theoretical and practical alternative to adversarial methods. In addition to *Getting to YES*, a number of other accessible works on legal negotiation, while less well-known, have similarly focused on collaborative problem-solving. See, e.g., RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* (2d ed. 2006).

³ Integrative bargaining is a strategy in which parties seek to create entitlements beyond any fixed or tangible amount of resources, by "creating" other forms of value and "expanding the pie." Distributive bargaining is a strategy in which the parties negotiate to distribute among themselves a fixed amount of resources, usually money, chattels, real property, or other tangibles, by "claiming" entitlements and "dividing the pie." See generally FISHER, URY, & PATTON, *supra* note 2; Dean G. Pruitt & Steven A. Lewis, *The Psychology of Integrative Bargaining*, in *NEGOTIATIONS: SOCIAL-PSYCHOLOGICAL PERSPECTIVES* (Daniel Druckman ed., 1977); LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 116 (1987); Colleen M. Hanycz, *Introduction to the Negotiation Process Model*, in *THE THEORY AND PRACTICE OF REPRESENTATIVE NEGOTIATION* (Colleen M. Hanycz et al., eds., 2008).

bargaining strategy.⁴ “Principled negotiation” emphasizes four precepts: “separate the people over the problem”; “focus on interests, not positions”; “generate a variety of possibilities before deciding what to do”; and “insist that the result be based on some objective standard.”⁵ This model is more conducive to solving problems where the parties’ interests are shared, the issues in dispute are contingent or multi-dimensional, and the relationship between the parties is ongoing and worth preserving.⁶ As a normative prescription of what “good” negotiation looks like, principled negotiation has generated a rich academic scholarship exploring its theoretical and practical applications in a variety of settings.

One of the most contentious topics in this area is the relationship between gender and principled negotiation behavior, particularly in the law and business settings.⁷ The state of the research is murky. Some studies show that men and women are equally adept at applying principled negotiation skills, while other studies suggest that women may be less adept for a host of social, cultural, economic, legal, and psychological reasons.⁸ While this

⁴ I describe the distributive bargaining model as “adversarial” to evoke the prevailing common law practice of courtroom litigation. Because legal negotiations are often conducted in the shadow of the courts, they are generally assumed to be zero-sum games with only two possible, mutually-exclusive outcomes for each party at trial – victory or defeat. More to the point, the increasing and exorbitant delays, costs, biases, and other access to justice issues associated with the adversarial trial process continue to contribute to the impetus of legal negotiation as a necessary alternative. See generally Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984) [hereinafter, Menkel-Meadow, *Toward Another View*].

⁵ See FISHER, URY, & PATTON, *supra* note 2, at 10-11.

⁶ It is foolhardy to attempt a typology of legal disputes that are amenable to either a distributive or integrative bargaining strategy in all cases because there will always be exceptions. Perhaps the least controversial principle is that in a situation where there are only two parties at the table, neither has a desire for an ongoing relationship, and the only issue to be decided is money, the negotiation may be safely considered a competitive zero-sum game. In a situation where the parties’ joint gains or ongoing relationship are a priority, the negotiation may need to take on a more integrative form with recourse to behaviors like listening, respectful inquiry, information exchange, and creative brainstorming instead of or in addition to competitive tactics. See HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 33-43 (1982); Menkel-Meadow, *supra* note 4, at 785-86, n. 120-121.

⁷ Scholars have theorized, interrogated, and tested the impact of gender on negotiation since the earliest days of ADR research. For the first dedicated analysis of the issue, see JEFFREY Z. RUBIN & BERT R. BROWN, *THE SOCIAL PSYCHOLOGY OF BARGAINING* (1975).

⁸ The relevant legal, business, economic, and psychological literature on the relation of gender to principled negotiation is vast. There have been many comprehensive studies.

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question remains controversial, there is broad consensus among feminist negotiation scholars that a person's gender has a differential impact on her negotiation style, insofar as gender norms in society may inform or be informed by specific bargaining behaviors.⁹ I find it variously problematic that so much of the research in this area presumes gender difference to be a fixed, independent, and necessary determinant of principled negotiation skills, which is a fundamental error that has significant implications for the mission of gender equality.¹⁰ In my view, this field has been critically undertheorized, as there are postmodern feminist and queer theories of gender established elsewhere in the law that should invite feminists to critique the role of gender difference in principled negotiation.¹¹ This article is my attempt at one such critical intervention.

See, e.g., Carrie Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of a Theory*, 4 AM. B. FOUND. RES. J. 905 (1983); Carol Watson, *Gender Differences in Negotiating Behavior and Outcomes: Fact or Artifact*, in CONFLICT AND GENDER (Anita Taylor & Judi Beinstein Miller eds., 1994); Amy E. Walters et al., *Gender and Negotiator Competitiveness: A Meta-Analysis*, 76 ORG. BEH. AND HUM. DECISION PROCESSES 1 (1998); Alice Stuhlmacher & Amy Walters, *Gender Differences in Negotiation Outcome: A Meta-Analysis*, 52 PERSONNEL PSYCHOL. 653 (1999); Charles B. Craver & David W. Barnes, *Gender, Risk Taking, and Negotiation Performance*, 5 MICH. J. GENDER & L. 299 (1999); Laura J. Kray & Leigh Thompson, *Gender Stereotypes and Negotiation Performance: An Examination of the Theory and Research*, 26 ORG. BEHAV. SER. 103 (2005); Alice Stuhlmacher & R. B. Winkler, *Negotiating While Female: Research and Implications*, in GENDER AND COMMUNICATION ISSUES AT WORK (M. Barrett & M. J. Davidson eds., 2006); Hannah Riley Bowles & Kathleen L. McGinn, *Gender in Job Negotiations: A Two-Level Game*, 24 NEGOT. J. 393 (2008); Andreas Feidakis & Aspasia Tsaoussi, *Competitiveness, Gender, and Ethics in Legal Negotiations: Some Empirical Evidence*, 14 INTL. NEGOT. 537 (2009); Deborah M. Kolb, *Too Bad for the Women or Does It Have to Be? Gender and Negotiation Research over the Past Twenty-Five Years*, 25 NEGOT. J. 515 (2009) [hereinafter Kolb, *Too Bad for the Women*]; CHARLES B. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* 269-277 (7th ed. 2012) [hereinafter CRAVER, *EFFECTIVE LEGAL NEGOTIATION*]; Deborah M. Kolb, *Negotiating in the Shadows of Organizations: Gender, Negotiation, and Change*, 28 OHIO ST. J. ON DISP. RESOL. 241 (2013) [hereinafter Kolb, *Negotiating in the Shadows*]; Charles B. Craver, *The Impact of Gender on Negotiation Performance*, 14 CARDOZO J. CONFLICT RESOL. 339 (2013) [hereinafter Craver, *The Impact of Gender*].

⁹ *Infra* notes 28-31.

¹⁰ I am not the first to challenge the presumption of gender difference that underpins these studies. See Amy Cohen, *Gender: An (Un)Useful Category of Prescriptive Negotiation Analysis*, 13 TEX. J. WOMEN & L. 169 (2003-2004) [hereinafter Cohen, *An (Un)Useful Category*].

¹¹ While postmodern feminist theory and queer theory of gender are diverse fields, there are certain works that may be considered canonical and assisted me in developing this critique. See Gayle Rubin, *The Traffic in Women: Notes on the Political Economy of Sex*, in TOWARD AN ANTHROPOLOGY OF WOMEN (Rayna R. Reiter ed., 1975); PLEASURE

To contextualize my argument, I outline the traditional feminist approaches to gender and principled negotiation in Section II of this article. I explain that in the wake of empirical findings that so-called “women’s ways” of negotiating may be less effective than “men’s ways,”¹² scholars have offered prescriptive negotiation advice that roughly maps onto two forms of difference feminism: *liberal feminist negotiation* (interpreted here to mean “fix the woman”) and *cultural feminist negotiation* (interpreted here to mean “fix the system around the woman”).¹³ Because these approaches are founded on firm, ideological conceptions of gender difference, they reflect and reinscribe potentially harmful sex-based stereotypes about negotiation behavior. And because these approaches locate gender identity as the necessary site of feminist organizing, they provide negotiators with a limited range of conceptual tools for their practical gain and political mobilization.

AND DANGER: EXPLORING FEMALE SEXUALITY (Carole S. Vance ed., 1984); Leo Bersani, *Is the Rectum a Grave?*, in AIDS: CULTURAL ANALYSIS, CULTURAL ACTIVISM (Douglas Crimp ed., 1988); MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, VOL. 1, AN INTRODUCTION (Robert Hurley trans., 1988) [hereinafter FOUCAULT, THE HISTORY OF SEXUALITY]; EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET (1990) [hereinafter SEDGWICK, EPISTEMOLOGY OF THE CLOSET]; JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990) [hereinafter BUTLER, GENDER TROUBLE]; Judith Butler, *Imitation and Gender Insubordination*, in INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES (Diana Fuss ed., 1991) [hereinafter Butler, *Imitation and Gender*]; Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045 (1992); EVE KOSOFSKY SEDGWICK, TENDENCIES (1993) [hereinafter SEDGWICK, TENDENCIES]; JUDITH BUTLER, BODIES THAT MATTER (1993) [hereinafter BUTLER, BODIES THAT MATTER]; MICHAEL WARNER, FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY (1993); SEYLA BENHABIB, JUDITH BUTLER, DRUCILLA CORNELL, & NANCY FRASER, FEMINIST CONTENTIONS: A PHILOSOPHICAL EXCHANGE (1995); FEMINIST CONSEQUENCES: THEORY FOR THE NEW CENTURY (Elizabeth Bronfen & Misha Kayka eds., 2000); Maxine Eichner, *On Postmodern Feminist Legal Theory*, 36 HARV. C. R.-C.L. L. REV. 1 (2001). Postmodern feminist theory and queer theory have also found illuminating applications in many areas of law. See JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM (2006) [hereinafter HALLEY, SPLIT DECISIONS].

¹² A few scholars have suggested to the contrary – that, if there was ever a question about how women could achieve equal success in the male-dominated legal profession, that question is no longer relevant in light of women’s gains by admission to law schools and law firms or changing models of negotiation practice. See, e.g., JAY FOLBERG & DWIGHT GOLANN, LAWYER NEGOTIATION: THEORY, PRACTICE, AND LAW 187 (2d ed. 2011). These scholars remain in the minority.

¹³ I adopt the well-known labels “liberal feminism” and “cultural feminism” to capture the general contours of the theoretical terrain in this area, with the knowledge that scholars may apply these terms too readily to simplify or dismiss the more nuanced ideas of others with whom they disagree. This is not my intention.

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I elaborate my critique in Section III of the article. Drawing primarily on the work of Eve Kosofsky Sedgwick, Judith Butler, and Michel Foucault, I suggest that we should “trouble” the assumption underpinning the traditional feminist approaches that gender identities are not socially defined or capable of subversion. This is plainly inconsistent with views that see gender as a performative practice, which is animated by intersecting systems of cultural regulation on the individual, interactional, and institutional levels.¹⁴ By eliding these dimensions, I argue that the traditional approaches fail to recognize the wide, complex, and often contradictory range of behaviors that can arise in women and men, including how these behaviors can be harnessed by feminist negotiators for their practical and political benefit. This leads me to conclude that if feminist negotiators learned to adapt our abilities beyond the limits of fixed gender identity,¹⁵ we would gain access to more diverse and enabling strategies to increase our tactical leverage and suggest new, potentially liberating ways to address gender inequality in our society.

II. TRADITIONAL APPROACHES TO GENDER IN PRINCIPLED NEGOTIATION

A. *The “Sex/Gender” Framework*

Following the publication of *Getting to YES*, there has been an enormous amount of literature published on the theory, practice, and pedagogy of principled negotiation. Its model is summarized with four key precepts.¹⁶ The first precept, “*separate the people from the problem*,” is that negotiators should regard and make efforts to foster their personal relationships separately from any substantive concessions needed to resolve the dispute. Its second precept, “*focus on interests, not positions*,” is that negotiators

¹⁴ See JUDITH BUTLER, *GENDER TROUBLE*, *supra* note 11, at 37-48 (“[G]ender proves to be performative – that is, constituting the identity it is purported to be. In this sense, gender is always a doing, though not a doing by a subject who might be said to pre-exist the deed . . . There is no gender identity behind the expressions of gender; that identity is performatively constituted by the very “expressions” that are said to be its results.”); Judith Butler, *Imitation and Gender*, *supra* note 11, at 21. For another application of Butler’s theory in the negotiation context, see Cohen, *An (Un)Useful Category*, *supra* note 10, at 189-91.

¹⁵ Peter Adler, *Protean Negotiation*, in *THE NEGOTIATOR’S FIELDBOOK: A DESKBOOK FOR THE EXPERIENCED NEGOTIATOR* (Andrea Kupfer Schneider & Christopher Honeyman, eds., 2006).

¹⁶ See FISHER, URY, & PATTON, *supra* note 2, at 10-11.

should emphasize “interests,” defined as the underlying needs or desires that initially brought one or both parties to the table (say, a party’s interest in providing for her family), before one or both of their stated “positions” on specific issues or outcomes is to be decided (say, the party’s position that she be paid \$100,000 in annual salary). Its third precept, “*generate a variety of options before deciding what to do*,” is that negotiators should invent multiple possible options for mutual gain (“enlarging the pie”), putting them all on the table before taking a position (“dividing the pie”). Its fourth precept, “*insist that the result be based on some objective standard*,” is that negotiators should conduct an externally legitimate appraisal of a negotiated outcome rather than allow it to be determined by the sole exercise of subjective wills and power. Fisher, Ury, and Patton explain that “[t]hese four points define a straightforward method of negotiation that can be used under almost any circumstance.”¹⁷ Indeed, principled negotiation has become paradigmatic in legal and business studies as a model of effective bargaining practice and pedagogy.

Since researchers theorized these foundations, there has been a flood of interest in the possible relationship between individual background characteristics and principled negotiation behaviors.¹⁸ To my knowledge, no characteristic has been interrogated and tested in this context more than gender.¹⁹ This is partly explained by the historical coincidence of the rise of ADR within the legal and business professions²⁰ and the rise of the women’s movement, having as its focus the incidents of sex inequality in society and the social and cultural dynamics in law and business that produce them. The ongoing revelation of the differential treatment of women at work and persistent gender gap in wages and promotional opportunities continues to

¹⁷ *Id.*

¹⁸ RUBIN & BROWN, *supra* note 7. Gender has been studied in negotiation theory and practice by academics in diverse fields including law, economics, business, game theory, psychology, communications, anthropology, sociology, political studies, and international relations. See Carrie Menkel-Meadow, *Teaching About Gender and Negotiation: Sex, Truths, and Videotape*, 16 NEGOT. J. 357, 360 (2000) [hereinafter Menkel-Meadow, *Teaching About Gender*].

¹⁹ Theoretical and empirical studies claiming to observe the incidents of sexed/gendered negotiation behaviors are numerous, spawning several useful summaries and meta-analyses. See RUBIN & BROWN, *supra* note 7, at 169; *supra* note 8 and accompanying text.

²⁰ The judicial promotion and mandate of settlement as a means of increasing access to justice and administrative efficiency, together with the concomitant growth of ADR as a distinct field of study, has been noted by various scholars. See, e.g., Marc Galanter & Mia Cahill, “*Most Cases Settle*”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1342-43 (1994).

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inspire academic and popular interest in finding the right fix.²¹ While many disagree on the role of negotiation in contributing to the problem or the solution, gender is seen as an organizing principle of professional life and an important category of prescriptive negotiation analysis.

Another reason for this flood of interest is the apparent ease with which a negotiator's gender can be attributed to male and female birth sex assigned bodies, so long as researchers improperly aggregate their conceptions of sex and gender.²² As most feminist and queer theorists understand it, "sex" refers to anatomical and physiological attributes identified and assigned at birth that distinguish men from women. "Gender" refers to clusters of social and cultural traits overlaid on these distinctions that are typically associated with an oppositional "masculinity" and "femininity," ranging from physical appearance and self-presentation to personality, attitude, tone of voice, speech patterns, body language, affectation, and behavior.²³ This grounds my necessary disclaimer that much of the work I characterize in this article as taking one of the traditional feminist approaches to "gender" in principled negotiation theory and practice, which term is predominant in the literature, is really about sex.²⁴ The control groups in these studies are often comprised

²¹ Deborah Kolb attributes recent interest in the role of gender in negotiation to increased attention paid to sex inequality in employment. Women are still nowhere near parity among the partner ranks or senior management of law firms, nor do they appear to be progressing fast enough. See Kolb, *Negotiating in the Shadows*, *supra* note 8, at 241-42.

²² Researchers have explicitly based their methodology on the perception that "gender" is one of the most readily observable indicators of social and cultural differentiation among negotiators. See, e.g., RUBIN & BROWN, *supra* note 7, at 169; CHARLES B. WIGGINS & L. RANDOLPH LOWRY, *NEGOTIATION AND SETTLEMENT ADVOCACY: A BOOK OF READINGS* 457 (2d ed. 2005); Deborah M. Kolb & Linda L. Putnam, *Gender is More than Who We Are*, in *THE NEGOTIATOR'S FIELDBOOK: A DESKBOOK FOR THE EXPERIENCED NEGOTIATOR* 315 (Andrea Kupfer Schneider & Christopher Honeyman, eds., 2006)

²³ Gayle Rubin charts these definitions as comprising the feminist sex/gender system. See generally Rubin, *supra* note 11, at 157-210. See also SEDGWICK, *EPISTEMOLOGY OF THE CLOSET*, *supra* note 11, at 27-28. Toril Moi offers an equally concise schematic: "female" as a "matter of biology", "feminine" as a "set of culturally defined characteristics", and "feminist" as a "political position." Toril Moi, *Feminist, Female, Feminine*, in *THE FEMINIST READER: ESSAYS IN GENDER AND THE POLITICS OF LITERARY CRITICISM* 117 (Catherine Belsey & Jane Moore eds., 1989).

²⁴ See Kolb, *Too Bad for the Women*, *supra* note 8, at 517 (explaining that the terms "sex" and "gender" tend to be used interchangeably in the negotiation field). This conflation of sex and gender is not unique to the legal literature on negotiation, and it is not always unintentional or necessarily the mark of a problematic politics. Consider, for example, Catharine MacKinnon's theory that supports protecting female workers who have given up ideal employment conditions because of child-care responsibilities by

of men and women in which birth sex assignments and gendered traits and tendencies are conflated (“sex/gender”), which sex and gender characteristics may or may not be congruent in reality.²⁵ This slippage can be traced through the studies’ methodology. Often, these studies assume that specific bargaining behaviors are gender-coded masculine or feminine. These assumptions then form the basis of hypotheses about the behaviors of birth-assigned male and female subjects. These behaviors are then tested, observed, and described in gendered and not sexual terms. Consequently, any observed gender differences between the subjects are attributed to other birth-assigned men or women.²⁶ This imprecision lays the groundwork for certain feminist theories of negotiation that vastly underestimate the range of gender-related determinants of behavior, which in turn leads to prescriptive negotiation advice that is largely applicable to mythological, sex/gender congruent, “male/masculine” men and “female/feminine” women only. One of my intentions in this article is to challenge this framework.

B. *Sex Gender Difference in Principled Negotiation*

Given its historical methodology, the animating theme in most legal, economic, and psychological work on gender in principled negotiation is male/masculine and female/feminine difference (“M” and “F” or “M/F”).²⁷

offering protections to women; this asks that disadvantages produced by gender are remedied by reference to sex. See CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN – A CASE OF SEX DISCRIMINATION* 122-24 (1979). Eve Kosofsky Sedgwick goes further, arguing that a conceptual confusion underpins the very ideas of sex and gender. See SEDGWICK, *EPISTEMOLOGY OF THE CLOSET*, *supra* note 11, at 29 (arguing that feminist deployments of Rubin’s “sex/gender” system can only use “sex/gender” to delineate a problematic space rather than a crisp distinction).

²⁵ Indeed, if we define “gender” as social and cultural traits traditionally associated with masculinity and femininity, often subjectively perceived and overlaid onto birth sex-assigned bodies, it is more challenging to devise a scientific methodology that identifies, isolates, and measures gender effects, and not conflated sex/gender effects, in a controlled experiment involving male and female birth sex-assigned bodies.

²⁶ For a similar deconstruction of methodology, see Cohen, *An (Un)Useful Category*, *supra* note 10, at 177, 182. It is important to note, of course, that not all studies in the negotiation field fail to disaggregate sex and gender. See, e.g., Leonard Greenhalgh & Roderick W. Gilkey, *Our Game, Your Rules: Developing Effective Negotiating Approaches*, in NOT AS FAR AS YOU THINK: THE REALITIES OF WORKING WOMEN 135, 137-42 (1986).

²⁷ Here and throughout, I apply and expand upon Janet Halley’s shorthand for what she describes as the constitutive minima of North American feminisms: M/F, M > F, and carrying a brief for F. See HALLEY, *SPLIT DECISIONS*, *supra* note 11, at 4-5.

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That is, men negotiate differently than women,²⁸ negotiating with someone of the same sex is different than negotiating with someone of the opposite sex,²⁹ men and women experience negotiations differently in cases where gender is salient to the context of the dispute,³⁰ and contextual variables may aggravate or alleviate the differential impact that gender makes.³¹ These insights follow a wave of interdisciplinary research that continues to test hypotheses about gender difference in cognitive processing,³² child development,³³ socio-linguistics,³⁴ and other social sciences under the wider umbrella of negotiation studies. To organize the extensive findings on this issue, I have adapted a framework created by Deborah Kolb that suggests there are three predominant scholarly perspectives on the role of gender difference in negotiation—what I have called the “individual,” the

²⁸ See *infra* “Negotiation Traits and Tendencies by Sex/Gender.”

²⁹ See generally Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991); Ian Ayres & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, 85 AM. ECON. REV. 304 (1995); Karin Hederos Eriksson et al., *Gender Differences in Initiation of Negotiation: Does the Gender of the Negotiation Counterpart Matter?* 28 NEGOT. J. 407 (2012).

³⁰ There may be no comprehensive account of legal contexts where gender will be salient to a dispute, but it seems more likely to inhere in cases involving marriage and divorce, custody and access, discrimination on the basis of sex, sexual orientation, or gender identity, sexual harassment, sexually-based criminal offences, medical, physical, and emotional harms, immigration and refugee law, and social benefits claims. See Carrie Menkel-Meadow, *Women in Dispute Resolution: Parties, Lawyers, and Dispute Resolvers – What Difference Does Gender Difference Make*, 18 DISP. RESOL. MAG. 4, 6-8 (2011-2012) [hereinafter Menkel-Meadow, *Women in Dispute Resolution*].

³¹ See, e.g., Laura J. Kray et al., *Battle of the Sexes: Gender Stereotype Confirmation and Reactance in Negotiations*, 80 J. PERSONALITY & SOC. PSYCHOL. 942, 946 (2001) (suggesting that priming women negotiators with information that their gender is a diagnostic of ability negatively affected their performance).

³² See, e.g., DOREEN KIMURA, *SEX AND COGNITION* (1999); LINDA MEALY, *SEX DIFFERENCES: DEVELOPMENTAL AND EVOLUTIONARY STRATEGIES* (2000); STEVEN E. RHOADS, *TAKING SEX DIFFERENCES SERIOUSLY* (2004).

³³ See, e.g., Amy Sheldon, *Pickle Fights: Gendered Talk in Preschool Disputes*, in *GENDER AND CONVERSATIONAL INTERACTION* (Deborah Tannen ed., 1993).

³⁴ See, e.g., DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* (1990); NICOLE SCHAPIRO, *NEGOTIATING FOR YOUR LIFE: NEW SUCCESS STRATEGIES FOR WOMEN* (1993). Carol Gilligan writes that her own research, *infra* notes 106-111, “suggests that men and women may speak different languages that they assume are the same, using similar words to encode disparate experiences of self and social relationships. Because these languages share an overlapping moral vocabulary, they contain a propensity for systematic mistranslation, creating misunderstandings which impede communication and limit the potential for cooperation and care in relationships.” CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* 173 (1982).

“interactional,” and the “institutional” perspectives—each reflecting distinct ideologies about the production of gendered behaviors.³⁵

The first category of scholarship regards gender to be an “individual” characteristic that is primarily generated within the character of the focal negotiator herself, instead of the intragroup or situational context in which the negotiation takes place. This perspective has disparate origins and without providing a complete genealogy here, it should be contextualized within the broader essentialism-constructionism debate about the incidence of gender.³⁶ The prevailing view is no longer that gender differences in negotiation are individually determined as a matter of biology, meaning irreducible and constitutive of the sexes because men are born male/masculine and women are born female/feminine.³⁷ Rather, this view understands gender to be constructed through an ongoing process of historical integration.³⁸ Often drawing on research that boys and girls are acculturated to gender-oppositional ethics and orientations from a very young age, the central idea is that a male or female focal negotiator has been socialized to adopt characteristics that are coded masculine or feminine by society,³⁹ which are manifest in observable negotiation traits and tendencies

³⁵ See Kolb, *Negotiating in the Shadows*, *supra* note 8, at 242-51; Kolb & Putnam, *supra* note 22, at 317-19. Kolb’s interpretive categories are not watertight because negotiation researchers may share certain commitments that underpin one or more of them. With that said, Kolb’s categories remain a useful heuristic aid.

³⁶ See generally Janet Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994).

³⁷ As I go on to explain, arguments from biological determinism may be unappealing in the practice-oriented negotiation field, but evolutionary psychologists and neuropsychologists continue to propose theories from biology explaining why men and women exhibit certain behaviors. See MARTIN DALY & MARGO WILSON, *SEX, EVOLUTION, AND BEHAVIOR* (2d ed. 1983); ANNE CAMPBELL, *A MIND OF HER OWN: THE EVOLUTIONARY PSYCHOLOGY OF WOMEN* (2002); LOUANN BRIZENDINE, *THE FEMALE BRAIN* (2006). For a summary of findings suggesting that genetic or hormonal differences between the sexes could cause women to be less competitive than men, see Rachel Croson & Ury Gneezy, *Gender Differences in Preferences*, 47 J. ECON. LIT. 1, 20 (2009).

³⁸ See generally Halley, *Sexual Orientation*, *supra* note 36, at 550-553.

³⁹ See generally GILLIGAN, *supra* note 34, at 10; Sandra Lipsitz Bem, *Gender Schema Theory and Its Implications for Child Development: Raising Gender-aschematic Children in a Gender Schematic Society*, 8(4) SIGNS 598 (1983); SANDRA LIPSITZ BEM, *THE LENSES OF GENDER* 125-127, 138-175 (1993); NICKY MARONE, *WOMEN AND RISK: HOW TO MASTER YOUR FEARS AND DO WHAT YOU NEVER THOUGHT YOU COULD DO* 42-45 (1992); PAT HEIM & SUSAN K. GOLANT, *HARDBALL FOR WOMEN: WINNING AT THE GAME OF BUSINESS* (rev. ed. 2005); GAIL EVANS, *PLAY LIKE A MAN, WIN LIKE A WOMAN: WHAT MEN KNOW ABOUT SUCCESS THAT WOMEN NEED TO LEARN* 12-13

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that are similarly coded masculine or feminine in the academic and professional literature.⁴⁰

The second category of scholarship examines the role of “interactional” factors in constructing negotiation behaviors, including inter-group dynamics that permit or prohibit certain gendered performances in a variety of legal and business contexts. In this model, gender is not produced inside individuals but between them through language and practice, forming and reforming negotiation traits and tendencies that may be plotted along the lines of sex/gender difference. Often, this conceives of gender as depending on social and cultural “triggers” arising in the bargaining exchange on the theory that relations between two men, two women, one man and one woman, or some other configuration, can create observable effects in specific situations.⁴¹ Some of the most instructive research in this area explores the role of bias, stereotyping, and discrimination about sex/gender difference in negotiation that give rise to negative perceptions about one’s proclivity to negotiate or one’s preferred approach—a phenomenon that social psychologist Claude Steele calls “stereotype threat.” These perceptions can prime knowledge structures in the mind that assimilate behaviors consistent with the activated bias, stereotype, or discrimination, creating self-fulfilling prophecies that work to the negotiator’s disadvantage.⁴²

(2000); BETTY LEHAN HARRAGAN, *GAMES YOUR MOTHER NEVER TAUGHT YOU: CORPORATE GAMESMENSHP FOR WOMEN* 75-78, 282 (1977). For specific applications of socialization theory in the negotiation context, see Menkel-Meadow, *Teaching About Gender*, *supra* note 18, at 362-64; Greenhalgh & Gilkey, *supra* note 26, at 135; LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON’T ASK: NEGOTIATION AND THE GENDER DIVIDE* 30-31, 34-35 (2003); *but see* Deborah M. Kolb, *More Than Just a Footnote: Constructing a Theoretical Framework for Teaching about Gender in Negotiation*, 16 NEGOT. J. 347, 350 (2000) [hereinafter, Kolb, *More Than Just a Footnote*], citing Candace West & Don H. Zimmerman, *Doing Gender*, 1 GENDER & SOC’Y 125 (1987) (deemphasizing psychological socialization as the basis for gender difference) and Kolb, *Too Bad for the Women*, *supra* note 8, at 526-527 (suggesting that we work to “undo” gender construction by focusing on negotiated orders).

⁴⁰ For an excellent review of negotiation studies reflecting the “individual” or “focal negotiator” perspective, see Kray & Thompson, *supra* note 8.

⁴¹ See Kray, *supra* note 31, at 942; Menkel-Meadow, *Women in Dispute Resolution*, *supra* note 30, at 6; Hannah Riley Bowles et al., *Constraints and Triggers: Situational Mechanics of Gender in Negotiation*, 89 J. PERSONALITY & SOC. PSYCHOL. 951, 951-53 (2005); Catherine H. Tinsley et al., *Women at the Bargaining Table: Pitfalls and Prospects*, 25 NEGOT. J. 233, 234 (2009).

⁴² See Claude M. Steele, *A Threat in the Air: How Stereotypes Shape the Intellectual Identities and Performance of Women and African Americans*, 52 AM. PSYCHOLOGIST 613, 614 (1997); Sandra R. Farber & Monica Rickenberg, *Under-Confident Women and Over-Confident Men: Gender and Sense of Competence in a Simulated Negotiation*, 11

The third category of scholarship looks to relational dynamics as well, but with a focus on the “institutional” conditions in which gender may influence negotiation behavior, usually by enabling or disabling access to power. The idea is that emphasizing individual or interpersonal dynamics alone may fail to capture the broader situational forces impressing on a bargaining exchange. One strand of this research interrogates the correlation between gendered performances and the nature of negotiation games as distributive and adversarial (read: masculine) or integrative and collaborative (read: feminine).⁴³ Another strand analyzes the ways in which masculine and feminine orientations toward negotiation are triggered by disputes themselves, often in marriage and divorce, sexual harassment, and discrimination contexts where the subject matter may be socially or culturally linked to gender.⁴⁴ Yet another strand explores the differential impact of gender hierarchical structures within organizations and cultures, including the law and business professions, on male and female negotiators that are affected by them.⁴⁵ For instance, in Ann Hopkins’s sex discrimination case against a major accounting firm, gendered masculine women may be seen as pushy and requiring “a course in charm school,” while gendered feminine women may be seen as push-overs and requiring an “assertiveness training class.”⁴⁶ This research explores the social and cultural

YALE J. L. & FEMINISM 271, 274 (1999); Kray, *supra* note 31, at 943-955; Laura J. Kray et al., *Reversing the Gender Gap in Negotiations: An Exploration of Stereotype Regeneration*, 87 ORG. BEH. & HUMAN DEC. PROC. 386, 388-390 (2002); Laura J. Kray et al., *Stereotype Reactance at the Bargaining Table: The Effect of Stereotype Activation and Power on Claiming and Creating Value*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 399, 400-401, 404 (2004); Laura J. Kray & Linda Babcock, *Gender in Negotiations: A Motivated Social Cognitive Analysis*, in NEGOTIATIONS THEORY AND RESEARCH: FRONTIERS OF SOCIAL PSYCHOLOGY 203, 219 (Leigh L. Thompson ed., 2006); JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* 149 (2010); CRAVER, *EFFECTIVE LEGAL NEGOTIATION*, *supra* note 8, at 276.

⁴³ See, e.g., Kray, *supra* note 8, at 114-127; Bowles et al., *supra* note 41, at 956.

⁴⁴ *Supra* note 30 and accompanying text. For an illustration in the context of marriage and divorce, see Barbara C. Bedont, *Gender Differences in Negotiations and the Doctrine of Unconscionability in Domestic Contracts*, 12 CANADIAN FAM. L. J. Q. 21 (1994).

⁴⁵ See generally DEBORAH L. RHODE, ABA COMMISSION ON WOMEN IN THE PROFESSION, *THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION* 15 (2001), available at <http://womenlaw.stanford.edu/pdf/aba.unfinished.agenda.pdf>; Amanda J. Albert, *The Use of MacKinnon’s Dominance Feminism to Evaluate and Effectuate the Advancement of Women Lawyers as Leaders within Large Law Firms*, 35 HOFSTRA L. REV. 291 (2006).

⁴⁶ Ann Hopkins was an accountant whose candidacy for partnership at a male-dominated, international accounting firm was denied on the basis of sex-based

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costs of female negotiators' "double bind" in which they need to be, simultaneously, as masculine as professional standards require but as feminine as sex/gender stereotypes require.⁴⁷

By exposing these and other ways that gender is mobilized, the three predominant perspectives imply that negotiation traits and tendencies are flexible, free, and amenable to change—within certain limits.⁴⁸ Alternative conclusions are unappealing in a field oriented toward pragmatism, having as its mission the instrumentalist, practice-based *desiderata* of learning when, where, and why men and women negotiate differently and how they can manage these differences, improve their skills, and gain strategic advantage over their peers. Further to this goal, many researchers have claimed to identify certain "reliable truths"⁴⁹ about sex/gender differences in bargaining

stereotypes including, among others, that she should take "a course in charm school" and "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." She was the plaintiff in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), where the U.S. Supreme Court found that stereotypes used as standards for professional advancement are a form of impermissible sex discrimination under Title VII. See Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L. J. 1, 3 (1995) ("Ann Hopkins, I fear, may have been protected only because of the doubleness of her bind: It was nearly impossible for her to be both as masculine as the job required and as feminine as gender stereotypes require.").

⁴⁷ See Mary Power, *Does a Woman Negotiator Have to be Like a Man?* 5 AUSTL. J. DISP. RESOL. 49, 50 (1994); Madeline E. Heilman et al., *Penalties for Success: Reactions to Women Who Succeed at Male Gender-Typed Tasks*, 89 J. APPLIED PSYCHOL. 416 (2004); Hannah Riley Bowles et al., *Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes it Does Hurt to Ask*, 103 ORG. BEHAV. AND HUM. DECISION PROCESSES 84, 89-91 (2007); Tess Wilkinson-Ryan & Deborah Small, *Negotiating Divorce: Gender and the Behavioral Economics of Divorce Bargaining*, 26 LAW & INEQ. 109, 115-117 (2008); LINDA BABCOCK & SARA LASCHEVER, *ASK FOR IT: HOW WOMEN CAN USE THE POWER OF NEGOTIATION TO GET WHAT THEY REALLY WANT* 256-258 (2008); Tinsley et al., *supra* note 41, at 236-237; Kolb, *Too Bad for the Women*, *supra* note 8, at 522, 525. See also ABA COMMISSION ON WOMEN IN THE PROFESSION, *REPORT TO THE HOUSE OF DELEGATES* (1988), reprinted in Naomi Cahn, *Styles of Lawyering*, 43 HASTINGS L. J. 1039, 1048 (1992). But see Kolb, *Negotiating in the Shadows*, *supra* note 8, at 249-250 (arguing that the research on women's double bind in negotiation suffers from limitations).

⁴⁸ See BUTLER, *GENDER TROUBLE*, *supra* note 11, at 33; Francine M. Deutsch, *Undoing Gender*, 21 GENDER & SOC. 106, 108 (2007) ("[T]he doing gender approach implies that if gender is constructed, then it can be deconstructed. Gendered institutions can be changed, and the social interactions that support them can be undone.").

⁴⁹ SHELL, *supra* note 2 at 15. Additionally, Charles Craver's writing purports to describe "real" differences between male and female negotiators in respect of trust building, orientations to lying, levels of comfort with competitive situations, language use and spatial distance, formal education as a mitigating factor, views on appropriate

behavior, which leads them to offer advice about how men and women can negotiate more effectively. The typical prescription in these studies is that men and women should learn to anticipate and regenerate individual, interactional, and institutional forces in a controlled and constructive manner, consistent with the precepts of principled negotiation, so as to exploit others' expectations of their ability and expand their strategic repertoire.⁵⁰

Selected research findings on sex/gender differences in bargaining behavior are summarized in the chart below. To preface, certain of these studies reflect negotiation trends among discrete samples or populations only (e.g., students, lawyers, or high-level managers), or under specific conditions only (e.g., in distributive or integrative games, real life or simulated exercises, salary or employment negotiations), and do not claim to speak for all male and female negotiators at all times. Further, the cross-disciplinary study of gender and sexuality is evolving more rapidly than the theory and practice of principled negotiation, which means that to the extent these studies reproduce the problematic methodology of the sex/gender framework, theorize the origin of gender differences in individual rather than interactional or institutional dynamics, or otherwise fail to interrogate the politics of their findings, they may have diminished relevance or at least require qualification in light of more recent work, which the authors of these studies might very well acknowledge elsewhere.⁵¹ The chart elides these dynamics in concrete columns like "separate spheres," in the same dichotomous M/F structure that originates the traditional feminist approaches to gender in prescriptive negotiation analysis.

bargaining outcomes, and personal attacks. See CRAVER, EFFECTIVE LEGAL NEGOTIATION, *supra* note 8, at 270; Craver, *The Impact of Gender*, *supra* note 8, at 346-353.

⁵⁰ See DEBORAH M. KOLB & JUDITH WILLIAMS, THE SHADOW NEGOTIATION: HOW WOMEN CAN MASTER THE HIDDEN AGENDAS THAT DETERMINE BARGAINING SUCCESS 129 (2000); Kolb, *More Than Just a Footnote*, *supra* note 39, at 351-352; Menkel-Meadow, *Women in Dispute Resolution*, *supra* note 30, at 6.

⁵¹ See generally Deborah M. Kolb & K. L. McGinn, *Beyond Gender and Negotiation to Gendered Negotiations*, 2 NEGOT. AND CONFLICT MAN. RES. 1, 1-3 (2009) (explaining that laboratory research on gender in negotiation has focused on individual differences rather than "second generation" gender issues); Kolb, *Too Bad for the Women*, *supra* note 8, at 519-20.

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Negotiation Traits and Tendencies by Sex/Gender

MALE / MASCULINE ("M")	FEMALE / FEMININE ("F")
Perform better in competitive environments.	Perform worse in competitive environments. ⁵²
Participate in competitive interactions more often.	Choose to participate in competitive interactions less often. ⁵³
Less likely to avoid competitive situations and acknowledge competitive wishes.	More likely to avoid competitive situations and acknowledge competitive wishes. ⁵⁴
Ask for more and set higher targets.	Ask for less and set lower targets. ⁵⁵
Less risk averse.	More risk averse. ⁵⁶
Less eager to settle.	More eager to settle. ⁵⁷
Use more direct language and less disclaimers.	Use more tentative and deferential language. ⁵⁸
Use more dominant nonverbal signs.	Use less dominant nonverbal signs. ⁵⁹

⁵² See Bowles et al., *supra* note 41, at 953; Croson & Gneezy, *supra* note 37, at 18-21.

⁵³ See Muriel Niederle & Lisa Vesterlund, *Do Women Shy Away from Competition? Do Men Compete Too Much?* 122 Q. J. OF ECON. 1067, 1096-1100 (2007).

⁵⁴ See Irene P. Stiver, *Work Inhibitions in Women: Clinical Considerations* 2 (Wellesley College, Working Paper, 1983); Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 STAN. L. REV. 1547, 1550-1551 (1993); BABCOCK & LASCHEVER, *supra* note 39, at 102-103; Fiona Greig, *Propensity to Negotiate and Career Advancement: Evidence from an Investment Bank that Women are on a "Slow Elevator,"* 24 NEGOT. J. 495, 496-497 (2008).

⁵⁵ See BABCOCK & LASCHEVER, *supra* note 39, at 1-4.

⁵⁶ See *id.* at 138; See Croson & Gneezy, *supra* note 37 at 7; BABCOCK & LASCHEVER, *supra* note 47, at 32.

⁵⁷ See Feidakis & Tsaoussi, *supra* note 8, at 560.

⁵⁸ See Larry R. Smeltzer & Kittie W. Watson, *Gender Differences in Verbal Communication During Negotiations*, 3 COMM. RES. REP. 74, 78 (1986); DEBORAH TANNEN, *THAT'S NOT WHAT I MEANT! HOW CONVERSATION STYLE MAKES OR BREAKS RELATIONSHIPS* 71-73 (1986); Deborah Kolb & Gloria Coolidge, *Her Place at the Table: A Consideration of Gender Issues in Negotiation*, in NEGOTIATION THEORY AND PRACTICE 20-21 (J. William Breslin & Jeffery Z. Rubin eds., 1991); Lynn Smith-Lovin & Dawn T. Robinson, *Gender and Conversational Dynamics*, in GENDER, INTERACTION, AND INEQUALITY 122, 124-26 (Cecilia L. Ridgeway ed., 1992), SCHAPIRO, *supra* note 34, at 68.

⁵⁹ See BABCOCK & LASCHEVER, *supra* note 39, at 105.

MALE / MASCULINE (“M”)	FEMALE / FEMININE (“F”)
Use louder voices and consider loud voices to be less aggressive.	Use softer voices and consider loud voices to be more aggressive. ⁶⁰
Speak for longer periods of time.	Speak for shorter periods of time. ⁶¹
Interrupt more frequently.	Interrupted more frequently. ⁶²
Downplay doubts during conversations.	Downplay certainty during conversations. ⁶³
Exert more control over the subject matter.	Exert less control over the subject matter. ⁶⁴
Use more threats and derogatory put-downs.	Use less threats and derogatory put-downs. ⁶⁵
Achieve better outcomes in distributive negotiations.	Achieve worse outcomes in distributive negotiations. ⁶⁶
Emphasize abstract and objective criteria in their dealings with other people.	Emphasize relational needs in their dealings with other people. ⁶⁷
More concerned about winning.	More concerned about maintaining a good relationship with the other side. ⁶⁸

⁶⁰ See LEONARD J. SAX, WHY GENDER MATTERS: WHAT PARENTS AND TEACHERS NEED TO KNOW ABOUT THE EMERGING SCIENCE OF SEX DIFFERENCES 18 (2006).

⁶¹ See KAY DEAUX, THE BEHAVIOR OF WOMEN AND MEN 60 (1976); Melvin J. Kimmel et al, *Effects of Trust, Aspiration, and Gender on Negotiation Tactics*, 38 J. PERSONALITY & SOC. PSYCHOL. 9, 22 (1980); DEBORAH TANNEN, GENDER AND DISCOURSE 53-77 (1994); Kolb & Coolidge, *supra* note 58, at 69.

⁶² See DEAUX, *supra* note 61; TANNEN, *supra* note 61; DEBORAH TANNEN, TALKING FROM NINE TO FIVE: HOW WOMEN’S AND MEN’S CONVERSATIONAL STYLES AFFECT WHO GETS HEARD, WHO GETS CREDIT, AND WHAT GETS DONE AT WORK 293 (1994).

⁶³ See TANNEN, *supra* note 61, at 35-36.

⁶⁴ See DEAUX, *supra* note 61, at 60; TANNEN, *supra* note 61, at 53-77.

⁶⁵ See Kimmel et al., *supra* note 61, at 21-22.

⁶⁶ See Stuhlmacher & Walters, *supra* note 8, at 673-674; Russell Korobkin & Joseph Doherty, *Who Wins in Settlement Negotiations?*, 11 AM. L. & ECON. REV. 162, 198 (2009).

⁶⁷ See Lee E. Teitelbaum et al., *Gender, Legal Education, and Legal Careers*, 41 J. LEGAL EDUC. 443, 446 (1991).

⁶⁸ See RUBIN & BROWN, *supra* note 7, at 173; Kray & Babcock, *supra* note 42, at 205; Feidakis & Tsoussi, *supra* note 8, at 560; Karen E. Lauterbach & Bryan J. Weiner,

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MALE / MASCULINE ("M")	FEMALE / FEMININE ("F")
Value equitable distributions that reflect pertinent power imbalances.	Value equal distributions even when possessing greater economic strength. ⁶⁹
Divide resources in a self-serving way.	Divide resources in an equal way. ⁷⁰
More <i>win-lose</i> oriented.	More <i>win-win</i> oriented. ⁷¹
Initiate negotiations more often.	Initiate negotiations less often. ⁷²
More positively disposed toward negotiation.	Less positively disposed toward negotiation. ⁷³
More likely to negotiate for themselves.	Less likely to negotiate for themselves. ⁷⁴
Negotiate more often for salary increases and promotions.	Negotiate less often for salary increases and promotions. ⁷⁵
Feel more confident and successful.	Feel less confident and successful. ⁷⁶

Dynamics of Upward Influence: How Male and Female Managers Get Their Way, 7 LEADERSHIP Q. 87, 102 (1996);

⁶⁹ See Linda D. Molm & Mark Hedley, *Gender, Power, and Social Exchange*, in GENDER, INTERACTION, AND INEQUALITY 1, 4 (Cecilia L. Ridgeway ed., 1992); ROY J. LEWICKI ET AL., NEGOTIATIONS 330 (2d ed. 1994); Catherine Eckel et al., *Gender and Negotiation in the Small: Are Women (Perceived to Be) More Cooperative Than Men?* 24 NEGOT. J. 429, 441 (2008).

⁷⁰ See Werner Guth, Carsten Schmidt, & Matthias Sutter, *Bargaining Outside the Lab – A Newspaper Experiment of a Three-Person Ultimatum Game* 117 ECON. J. 449, 464 (2007).

⁷¹ See Kolb, *Too Bad for the Women*, *supra* note 8, at 520-521; BABCOCK & LASCHEVER, *supra* note 39, at 164-172.

⁷² See BABCOCK & LASCHEVER, *supra* note 39, at 1-3; Deborah Small, Michele Gelfand, Linda Babcock, & Hilary Gettman, *Who Gets to the Bargaining Table? The Influence of Gender and Framing on the Initiation of Negotiation*, 93 J. PERSONALITY & SOC. PSYCH. 600, 600-613 (2007).

⁷³ See Small et al., *id.*, at 610; BABCOCK & LASCHEVER, *supra* note 39, at 114; Kray & Babcock, *supra* note 42, at 203.

⁷⁴ See Lauterbach & Weiner, *supra* note 68, at 102-103; BABCOCK & LASCHEVER, *supra* note 39, at 2-4.

⁷⁵ See SHELL, *supra* note 2, at 114.

⁷⁶ See Carol Watson, *Gender Versus Power as a Predictor of Negotiation Behavior and Outcomes*, 10 NEGOT. J. 117, 122 (1994); Sylvia Beyer & Edward M. Bowden, *Gender Differences in Self-Perceptions: Convergent Evidence from Three Measures of*

MALE / MASCULINE (“M”)	FEMALE / FEMININE (“F”)
Feel higher self-efficacy about negotiating ability.	Feel lower self-efficacy about negotiating ability. ⁷⁷

After these studies assume, test, and conclude the validity of M/F as illustrated above, they may or may not take a critical turn by attempting to challenge the sex/gender framework and remedy perceived deficiencies in the principled negotiation model. Where they do so, these are generally progressive efforts to correct unfair or unequal bargaining processes or outcomes that have been observed between women and men, often framed as the result of legal and professional standards that historically favor so-called “men’s ways” over “women’s ways” of negotiating as identified in the chart above. This reflects an ideological commitment to exposing the incidents of sex/gender inequality that devalue or subordinate female/feminine traits and tendencies in principled negotiation theory and practice (M over F, or “M > F”).⁷⁸

The most convincing argument in this vein is that consensual forms of ADR actually *support*, rather than subvert, the adversarial and masculinist structure of the common law system. On this theory, principled negotiation is more appropriately termed “litigotiation”⁷⁹ or “bargaining in the shadow of the law”⁸⁰ because its most effective practice manifest in the four key precepts reproduces a process bias that favors instrumental, rational, rights-

Accuracy and Bias, 23 PERSONALITY & SOC. PSYCHOL. BULL. 157, 167-168 (1997); ROGER VOLKEMA, LEVERAGE: HOW TO GET IT AND HOW TO KEEP IT IN ANY NEGOTIATION 154 (2006); Muriel Neiderle & Lise Vesterlund, *Gender Differences in Competition*, 24 NEGOT. J. 447, 460 (2008) [hereinafter Neiderle & Vesterlund, *Gender Differences*].

⁷⁷ See Cynthia Kay Stevens, et al., *Gender Differences in the Acquisition of Salary Negotiation Skills: The Role of Goals, Self-Efficacy, and Perceived Control*, 78 J. APPLIED PSYCHOL. 723, 724 (1993).

⁷⁸ HALLEY, SPLIT DECISIONS, *supra* note 11, at 4–5.

⁷⁹ See Galanter & Cahill, *supra* note 20, at 1341–42 (“Rather than two separate tracks – adjudication on the one hand and negotiation and settlement on the other – there is a single process of pursuing remedies in the presence of courts. For mnemonic purposes, we attach to it the fanciful neologism ‘litigotiation.’”).

⁸⁰ Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950 (1979) (explaining their titular concept that differently interested parties will negotiate agreements in polycentric decision-making contexts that are informed by the parties’ sense of the enforceable and unenforceable, legal and social rules and standards looming in the background). See also Galanter & Cahill, *id.*, at 1349.

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oriented, and other male/masculine ethics reflected in the litigation model more broadly.⁸¹ Carrie Menkel-Meadow explains that the basic values underlying the litigation model are advocacy, persuasion, hierarchy, competition, and binary results (win/lose), extending from the courtroom to the boardroom, which affect the ways that lawyers advise their clients (“maximize your returns”), structure transactions (“draft this to your advantage”), and negotiate disputes (“anchor high,” “hide your weaknesses,” “hit them where it hurts”).⁸² It follows that because social structures in the legal and business professions are male-defined and dominated,⁸³ they create principled negotiation standards that are reiterative of gender hierarchy, incongruous with women’s unique moral development, or incompatible with female and feminine models of professional achievement. This may impact women’s ability to negotiate effectively in practice so long as standards of “effectiveness” are prescribed by these male/masculine structures. For example, research suggests that women place greater emphasis on relationships and are more likely to make substantive concessions to maintain them.⁸⁴ However, the first precept of principled negotiation, “separate the people over the problem,” teaches that the key to maintaining relationships is not by making concessions but by tackling people problems

⁸¹ Feminist scholars have criticized the principled negotiation model for reflecting male norms. See generally Menkel-Meadow, *Teaching About Gender*, *supra* note 18, at 359; Justine Kirby, *Would Principled Negotiation Have Saved Eve: A Feminist Analysis of Getting to YES*, 9 OTAGO L. REV. 122, 126–139 (1997); Eve Hill, *Alternative Dispute Resolution in a Feminist Voice*, 5 OHIO ST. J. DISP. RESOL. 337, 341 (1990).

⁸² Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women’s Lawyering Process*, 1 BERKELEY WOMEN’S L. J. 39, 51 (1985) [hereinafter Menkel-Meadow, *Portia in a Different Voice*]; see also Kolb, *Too Bad for the Women*, *supra* note 8, at 518 (“Also embedded in this work is the unquestioned idea that higher salaries, more aggressive negotiation behavior, and greater personal confidence are normatively ‘better’ when arguments could be made—and research has been done—to challenge these cultural assumptions.”).

⁸³ See Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy*, 8 YALE J. L. & FEMINISM 333, 349 (1996) (arguing that law is seen rational, objective, abstract, logical/analytical, and rigorous, which characteristics are more often attributed to men than to women); Frances Olsen, *The Sex of Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 454–55 (David Kairys ed., 1990) (attributing the high value that society places on law, in part, on the fact that women were long excluding from practicing it).

⁸⁴ See Bonnie R. Kasten, *Separate Strengths: How Men and Women Manage Conflict and Competition*, in *NOT AS FAR AS YOU THINK: THE REALITIES OF WORKING WOMEN* 132 (Lynda L. Moore ed., 1986); WILLIAM F. MORRISON & HENRY H. CALERO, *THE HUMAN SIDE OF NEGOTIATIONS* 196 (1994).

directly, thereby creating a benchmark that disadvantages women.⁸⁵ Similarly, Deborah Kolb and Judith Williams have criticized the fourth precept, they “insist that the result be based on some objective standard,” for its being unreflective of women’s distinct experience:

Standards generally reflect the experience of the people setting them. And, by and large, men do the setting in our society. As a result, their experience becomes the yard stick for measuring what is normal. And, in a masked exercise of power, that standard is then rather cavalierly assumed to be gender neutral.⁸⁶

These arguments suggest that so-called “gender-neutral”⁸⁷ principled negotiation standards explicitly or implicitly reward male/masculine behaviors over and at the expense of female or feminine behaviors. Therefore, women may be socially, culturally, and legally disadvantaged at any bargaining table established on these standards.

Of course, there is writing in the principled negotiation field that accepts the inequality of $M > F$ as a fact without taking the critical turn—for example, writing that assumes, tests, or concludes that women are (or are perceived to be) less effective negotiators than men as a condition of their sex/gender by looking only to the individual and not the interpersonal or

⁸⁵ FISHER, URY & PATTON, *supra* note 2, at 21.

⁸⁶ KOLB & WILLIAMS, *supra* note 50, at 26.

⁸⁷ See Catharine MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 644-645 (1983); CATHARINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW, 54-55 (1987); Ann Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L. J. 1373, 1377 (1986) (“[A]bstract universality ... made maleness the norm of what is human, and did so *sub rosa*, all in the name of neutrality.”). See generally Meredith Render, *Misogyny, Androgyny, and Sexual Harassment: Sex Discrimination in a Gender-Deconstructed World*, 29 HARV. J. L. & GENDER 99, 107-108 (2006) (explaining how the gradual breakdown of facial restrictions on women led to laws and policies increasingly being framed in “gender-blind” terms, under which men continued to enjoy categorically preferred status). The same criticism has been levelled at facially “gender-neutral” or “gender-blind” employment criteria in the legal profession generally, as manifest in lawyer Nancy O’Mara Ezold’s landmark sex discrimination lawsuit against her former firm respecting its assessment of her “legal analytic ability.” See *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509 (3d Cir. 1992), *cert. denied*, 114 S. Ct. 88 (1993), cited in CATHARINE A. MACKINNON, SEX EQUALITY 168-169 (2d ed., 2007) [hereinafter MACKINNON, SEX EQUALITY]. For additional feminist critiques of “gender-neutrality” in the alternative dispute resolution context, see, e.g., Hill, *supra* note 81, at 341, 356-362; Kirby, *supra* note 81, at 136-139; Kolb & Coolidge, *supra* note 58, at 261-271.

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institutional levels for an explanation of why women are in deficit—either by omission or for its own political or pedagogical reasons.⁸⁸ But even this work is typically directed at the same objective as the more progressive scholarship. That is, to bring about an idealized vision in which both sexes (*i.e.*, all women and all men) achieve more fair and equal bargaining processes and outcomes in practice, even if this means we value gendered masculine and feminine behaviors unequally in setting principled negotiation benchmarks, by specifically advancing the cause of women at the bargaining table. Therefore, to the extent this scholarship opposes $M > F$ and frames its politics as a female or feminine emancipation project, it may be said that it is “feminist” as it “carries a brief for F.”⁸⁹ This much is clear and should be at least be generally agreed, but there is less consensus among scholars about what feminist negotiation looks like in practice, who should be responsible for it, and how it can be achieved.

C. *Traditional Approaches to Sex/Gender Difference in Principled Negotiation*

Working from the assumption that sex/gender difference in bargaining behavior exists, many feminist reformers continue to offer prescriptive negotiation advice about how to achieve more fair and equal bargaining processes and outcomes between women and men. The main divide appears to be whether women should conform to a historically male/masculine model of behavior that is fundamentally entrenched in society and/or seen as intrinsically good, or whether the law and business worlds should innovate and adopt an ethically female/feminine model of behavior as a substitute or supplementary perspective on how to conduct negotiations.⁹⁰

I. *LIBERAL FEMINIST NEGOTIATION*

The first approach to sex/gender difference in principled negotiation retains its central holding in many academic, professional, and more practice-oriented legal publications under various guises—that is the liberal feminist negotiation theme, “*fix the woman*.” At a high level, liberal

⁸⁸ See, *e.g.*, Korobkin & Doherty, *supra* note 66, at 184, 191-194 (describing the results of a study suggesting there are stark differences in negotiation performance between men and women).

⁸⁹ HALLEY, *SPLIT DECISIONS*, *supra* note 11, at 4-5.

⁹⁰ Deborah Kolb and Judith Williams characterize these two approaches to gender in negotiation as “Professor Higgins’ Advice” and “The Steel Magnolias’ Answer.” See KOLB & WILLIAMS, *supra* note 50, at 24-26.

feminism holds to the basic ideals of liberalism: freedom of choice and formal equality of opportunity in the marketplace.⁹¹ Women must be free from sources of constraint so that they are permitted to live self-determining and productive lives as men do, regardless of sex.⁹² But once these constraints are removed, any more radical and substantive equality objective to dismantle the gender hierarchies present at the structural level may fade away unnoticed, or at least be added to a long list of ancillary concerns in the liberal economy that should not be the prime mover of our legal, professional, or political organization.⁹³

⁹¹ Liberal feminism embraces the basic of tenets of liberalism, including the assumptions that humans are autonomous, rational, self-maximizing agents, liberty is the priority, rights deserve protection, and privacy should be supported. *See* Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 5 (1988) [hereinafter West, *Jurisprudence and Gender*] (positing that liberal legalism reflects “an existential state of highly desirable and much valued freedom.”). Liberal feminism embraces a vision of women’s formal equality within the current social, cultural, and legal structure, achieving empowerment through women’s rights and women’s solidarity movements. *See* Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U CHI. LEGAL F. 21, 32-33 (1999) (“Liberal feminism assumes that people are autonomous individuals making decisions in their own self-interest . . .”); Linda C. McClain, “Atomistic Man” Revisited: *Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171, 1175 n.10 (1992) (describing how liberal feminist principles motivate litigation strategies advocating formal equality for women). For a cross-section of liberal feminist deployments in the law, *see generally* Marie Ashe & Naomi R. Cahn, *Child Abuse: A Problem for Feminist Theory*, 2 TEX. J. WOMEN & L. 75, 101-102 (1993); Nancy Kim, *Toward a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism*, 25 COLUM. HUM. RTS. L. REV. 49, 97-98 (1993); Sherry Young, *Getting to Yes: The Case Against Banning Consensual Relationships in Higher Education*, 4 AM. U. J. GENDER & L. 269, 292 (1996); Martha Chamallas, *Past as Prologue: Old and New Feminisms*, 17 MICH. J. GENDER & L. 157, 157 (2010); Aya Gruber, *Neofeminism*, 50 HOUS. L. REV. 1325, 1332-38 (2013); Cyra Akila Choudhury, *Empowerment or Estrangement?: Liberal Feminism’s Visions of the “Progress” of Muslim Women*, 39 U. BAL. L. F. 153, 153 (2009).

⁹² *See* Becker, *supra* note 91 (“The solution to inequality between women and men is to offer individuals the same choices regardless of sex.”) Arguably, under American constitutional equality doctrine that is founded on liberalism, women are afforded equal access to traditionally male institutions to the extent they can prove they are similarly situated as men by assimilating the male norm. *See generally* Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1292 (1987); Valorie K. Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 BERKELEY WOMEN’S L. J. 68, 84 (2002).

⁹³ *See* Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1544-1552 (1983) [hereinafter Olsen, *The Family and the Market*] (“Reformers generally conceive of antidiscrimination law as a strategy to enable women to participate in the market as freely and effectively as men do The

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In the dispute resolution context, liberal feminism is reflected in prescriptions that find strong pressures to meet male-defined and dominated standards in the legal and business professions should operate to minimize, rather than emphasize, female/feminine traits and tendencies at the bargaining table. This theory finds that women are less effective than men in the individualistic, rough-and-tumble world of principled negotiation, whether because of their unique social development or the historically conciliatory, mothering roles that they are groomed to play. Reforming gender hierarchy in the system is idealistic, impractical, or otherwise beside the point because this is “real life” and women need to know the “rules of the game.” Therefore, liberal feminists argue that women should methodically assimilate male or masculine behaviors to better equip themselves for bargaining tasks in the market economy.⁹⁴

On this theory, the consequences of women’s failure to assimilate are apparently quite dire. Beyond the worldly impacts, Justine Kirby asks whether a liberal feminist approach to principled negotiation (which she calls the “pragmatic feminist” approach) would have “saved” Eve from the serpent’s deception and prevented original sin. Eve could not resist the serpent, Kirby suggests, because she had not stopped to probe his underlying interests, objectively assess his information, and evaluate her alternatives before eating the forbidden fruit. If only Eve had remembered this advice, she might have averted women’s most “infamous negotiation failure”⁹⁵ and not corrupted the natural world:

A “pragmatic feminist” approach, while acknowledging the broader societal context and recognizing that “female” characteristics have been devalued, focuses instead on practical steps that might improve the lot of women negotiators. . . .

reforms, however, do not go far enough toward real equality or empowerment of women. Moreover, they encourage market individualism. Antidiscrimination law does not end the actual subordination of women in the market but instead mainly benefits a small percentage of women who adopt “male” roles. Meanwhile, it legitimates the continued oppression of most women: the reforms maintain the status quo by particularizing and privatizing inequality and encouraging women to blame themselves for their failures in the market.”) *Id.* at 1542

⁹⁴ Mary Anne Case summarizes the appeal of liberal feminism as follows: “The masculine woman is today more readily accepted. Wanting to be masculine is understandable; it can be a step up for a woman, and the qualities associated with masculinity are also associated with success.” See Case, *supra* note 46, at 3.

⁹⁵ Kirby, *supra* note 81, at 122.

- preparation is especially important for women negotiators. In preparing for a negotiation, women should pay particular attention to their interests by asking how they feel about the issues likely to arise and exploring *why* they feel that way. By recognizing and (where justified) validating such concerns, women may feel more confident in pursuing their own interests in negotiation;
- women should be wary of seeking to empathise with and understand others' perspectives if there is no reciprocity—this could alter the balance of power in the negotiation to their disadvantage. One possible technique to encourage each negotiator to listen and understand the others is to ask each negotiator to summarise the other negotiators' interests;
- negotiators should ensure that everyone has an equal opportunity to speak. It may even be necessary to go so far as to allocate time in which each person can speak without interruption (except for minor points of clarification);
- women negotiators should be conscious of the different speaking styles typical of men and women, practise using a variety of styles and use different styles in various contexts to achieve the desired effect. For example, when a negotiator wishes to emphasize a point, a direct “male” speaking style may be more effective than a more equivocal “female” speaking style. Women should also be conscious of societal expectations—and conform with or violate these depending on which approach is likely to be more effective in the circumstances;
- women should be aware of their “emotions” during negotiation, as well as “rational” arguments. For example, if a negotiator feels uncomfortable about a seemingly “rational” proposal, she should consider whether that proposal is implicitly claiming value to her disadvantage;

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- in inventing options for mutual gain, women negotiators should ensure that they promote options that further their own interests as well as others' interests; and
- in suggesting "objective" criteria, women should consider how different criteria distribute value. However, using the language of "objectivity" may be helpful in some circumstances.⁹⁶

While Kirby acknowledges the preceding strategies may not be suitable for all women in all legal and business contexts,⁹⁷ it certainly seems she would advise as a practical matter that women should take off their relationship-colored glasses and check their motherly concern at the boardroom door. Kirby is not alone in this. Other liberal feminist commentators have argued that women should "ask" for more,⁹⁸ try to embrace competition,⁹⁹ "lean in,"¹⁰⁰ communicate more directly and authoritatively,¹⁰¹ speak in a lower tone,¹⁰² and "smile less often and only deliberately"¹⁰³ during legal and

⁹⁶ Kirby, *supra* note 81, at 141-142 (italics in original, underlining added).

⁹⁷ *Id.*

⁹⁸ See BABCOCK & LASCHEVER, *supra* note 39, at 9-10 ("Asking for what you want is the essential first step that kicks off a negotiation. If you miss your chance to negotiate, the best negotiation advice in the world isn't going to help you much. And women simply aren't asking at the same rate as men.") *Id.* at 10.

⁹⁹ See Neiderle & Vesterlund, *Gender Differences*, *supra* note 76, at 457-458 (describing the design of an experiment attempting to answer the question, "Can We Entice Women to Compete?").

¹⁰⁰ This phrase is borrowed from the self-identified feminist manual, SHERYL SANDBERG, *LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD* (2013), and its associated programming. The text remains hugely popular among women and others despite the criticism that its message is neoliberal "faux-feminist". See e.g., bell hooks, *Dig Deep: Beyond Lean In*, *THE FEMINIST WIRE* (October 28, 2013), available at <http://thefeministwire.com/2013/10/17973/> ("Ironically, Sandberg's work would not have captured the attention of progressives, particularly men, if she had not packaged the message of "lets go forward and work as equals within white male corporate elites" in the wrapping paper of feminism. ... Importantly, whether feminist or not, we all need to remember that visionary feminist goal which is not of a woman running the world as is, but a women doing our part to change the world so that freedom and justice, the opportunity to have optimal well-being, can be equally shared by everyone – female and male.").

¹⁰¹ Kolb & Coolidge, *supra* note 58, at 69.

¹⁰² See Marjorie Corman Aaron, *Strategy at the Negotiation Table: From Stereotypes to Subtleties*, *ALTERNATIVES TO HIGH COST LITIG.*, Apr. 2012, at 83, 91 ("We unconsciously associate power and authority with larger size, greater strength, deeper

business negotiations. To quote Fortune magazine's recommended rules for professional women: "Look like a lady; act like a man; work like a dog."¹⁰⁴ In this way, liberal feminist negotiation appears to be a one-way street: men's place is static, women's place is shifting, and women have a long way to go. This means M/F, $M > F$, and we should carry a brief for F by prescribing that women act male/masculine: $F \rightarrow M$.

2. CULTURAL FEMINIST NEGOTIATION

The second approach to sex/gender difference in principled negotiation has gained greater purchase in the critical legal literature for its politically transgressive premises—that is the cultural feminist negotiation theme, "*fix the system around the woman*." Cultural feminism is a strand of radical feminism that demands in its vision the upheaval of gender hierarchical structures in law and in life. The intention is to explore the nature of women's perspectives, reconstructing and revalorizing experiences that have been suppressed and may have real and profound redemptive power.¹⁰⁵

This work builds on the contribution of educational psychologist Carol Gilligan, who argues in her ground-breaking text, *In a Different Voice*, that representations of men's moral development are teleologically aimed toward an "ethic of justice," as opposed to the "ethic of care" as she observed in representations of women's moral development.¹⁰⁶ Gilligan concludes that

voice, confidence, and age . . . And men are typically larger and stronger, have lower voices, and more often employ communication patterns associated with confidence.").

¹⁰³ *Id.* at 92.

¹⁰⁴ Jaclyn Fierman, *Why Women Still Don't Hit the Top*, FORTUNE, July 1990.

¹⁰⁵ See generally Alice Echols, *The New Feminism of Yin and Yang*, in POWERS OF DESIRE: THE POLITICS OF SEXUALITY 439-59 (Ann Snitow, Christine Stansell, & Sharon Thompson eds., 1983) (applying the term "cultural feminism" to the growing trend within feminism in the late 1970s and 80s toward the essentialism and upward (re)evaluation of feminine values). See also Alice Echols, *The Taming of the Id: Feminist Sexual Politics, 1968-83*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 50-72 (Carole S. Vance ed., 1983).

¹⁰⁶ GILLIGAN, *supra* note 34, at 19-26, 29 (putting Lawrence Kohlberg's Heinz dilemma to groups of boys and girls, Gilligan asked whether a man should steal a drug to save his wife's life when a pharmacist demands a price the man cannot afford. She found that for boys, the moral problem arises because they frame the issue in terms of conflicting rights in property and life, leading to the formal and abstract solution that the man should steal the drug; for girls, the moral problem arises because they frame the issue in terms of conflicting responsibilities, leading to the contextual and narrative solution the man should either borrow money from someone or persuade the pharmacist to give him the drug for free by explaining the severity of his wife's condition).

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men and boys tend to experience themselves as separately identified individuals guided by law, logic, and rights ("ethic of justice"), while women and girls experience themselves through relationships with others as part of a broader web of concern ("ethic of care").¹⁰⁷ Many cultural feminists argue that male/masculine values in the exercise of moral reasoning (objectivity, self-interestedness) are deficient, but continue to enjoy a privileged place in society at the expense of female/feminine values (subjectivity, connectivity) through gender hierarchies.¹⁰⁸ Gilligan locates the social and cultural "origins of aggression"—and, it follows, the origins of the adversarial system—in a gendered masculine "failure of connection."¹⁰⁹ Cultural feminists believe that if men and women reinstituted the female/feminine "ethic of care" as our moral foundation,¹¹⁰ the law and business professions would be reformed for the better, whether by moderating or dismantling the litigation model, challenging liberal conceptions of freedom and autonomy, or moving away from an individual rights-based framework altogether.¹¹¹

¹⁰⁷ See generally *id.* But see JOAN C. TRONTO, *MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE* (1993) (advocating for the detachment of gender and the ethic of care).

¹⁰⁸ See e.g., GILLIGAN, *supra* note 34, at 32 ("[The male's stance] abstracts the moral problem from the interpersonal situation, finding in the logic of fairness an objective way to decide who will win the dispute."); *Id.* at 30 ("[The female's] world is a world of relationships and psychological truths where an awareness of the connection between people gives rise to a recognition of responsibility for one another, a perception of the need for response [Women] see the actors in the dilemma arrayed not as opponents in a contest of rights but as members of a network of relationships on whose continuation they all depend.").

¹⁰⁹ *Id.* at 173. But see Lloyd Burton et al, *Feminist Theory, Professional Ethics, and Gender-Related Distinctions in Attorney Negotiating Styles*, 1991 J. DISP. RESOL. 199, 242-245 (1991) (trying to replicate Gilligan's findings by mapping her "ethic of justice" and "ethic of care" onto competitive and collaborative bargaining orientations, respectively, finding only modest support for the correlation).

¹¹⁰ Compare GILLIGAN, *supra* note 34, at 174 ("[A] marriage between adult development as it is currently portrayed and women's development as it begins to be seen could lead to a changed understanding of human development and a more generative view of human life."), with ROBIN WEST, *CARING FOR JUSTICE* 280 (1997) [hereinafter WEST, *CARING FOR JUSTICE*] ("[T]he suggestion that women – and therefore the human community – can and should respond in a more nurturant, caring, and natural way to the needs of those who are weaker, is . . . one promise, among others, that the human community can be reconstituted in a way that will salvage the planet as well as save the species.")

¹¹¹ See Scales, *supra* note 87, at 1383; WEST, *CARING FOR JUSTICE*, *supra* note 110, at 277-278. See generally Menkel-Meadow, *supra* note 82; Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); Deborah L. Rhode, *The "Woman's Point of View,"* 38 J. LEGAL EDUC. 39 (1988); Paul J.

In the dispute resolution context, cultural feminism is a theory that sees great potential in a women's "different voice" to bring unrecognized benefits to the principled negotiation process, such as an increased focus on building relationships and earning trust through skills like active listening, information sharing, and empathy which are likely to assist parties to generate creative options and reach mutually-beneficial compromises.¹¹² These same concerns are manifest in the "dual concern" model of negotiation: for men and women to satisfy their own interests in mutual-gains bargains (*i.e.*, not zero-sum games), they should demonstrate a typically female/feminine concern for the interests of other parties.¹¹³ Menkel-Meadow makes this appeal most famously and persuasively:

Spiegelman, *Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web*, 38 J. LEGAL EDUC. 243 (1988); West, *Jurisprudence and Gender*, *supra* note 91; Judith C. Areen, *A Need for Caring*, 86 MICH. L. REV. 1067 (1988); Johanna Brenner, *Towards a Feminist Perspective on Welfare Reform*, 2 YALE J. L. & FEMINISM 99 (1989); Carrie Menkel-Meadow, *Feminization of the Legal Profession: The Comparative Sociology of Women Lawyers*, in 3 LAWYERS IN SOCIETY: COMPARATIVE THEORIES 196, 230-32 (Richard L. Abel & Philip S.C. Lewis eds., 1989); Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25 (1990); Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 VT. L. REV. 1 (1990); McClain, *supra* note 91; Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L. J. 2665 (1993); Carrie Menkel-Meadow, *What's Gender Got to Do With It?: The Politics and Morality of an Ethic of Care*, 22 N.Y.U. REV. L. & SOC. CHANGE 265 (1996) [hereinafter Menkel-Meadow, *What's Gender Got to Do With It?*]; Erika Rackley, *From Arachne to Charlotte: An Imaginative Revisiting of Gilligan's In a Different Voice*, 13 WM. & MARY J. WOMEN & L. 751 (2006-2007); Neil Cobb, *Compulsory Care-Giving: Some Thoughts on Relational Feminism, the Ethics of Care and Omissions Liability*, 39 CAMBRIAN L. REV. 11 (2008).

¹¹² See Carrie Menkel-Meadow, *Culture Clash in the Quality of Life in the Law: Changes in the Economics, Diversification and Organization of Lawyering*, 44 CASE W. RES. L. REV. 621, 639 (1994); Menkel-Meadow, *supra* note 4, at 797-801; FISHER, URY, & PATTON, *supra* note 2, at 167 ("Some research suggests that women are more likely than men to gather information in a more open and less structured way, to be more sensitive to relationships, and to operate on a morality that is based proportionately more on caring and obligations to others and less on rules and individual rights See, as a starting point, Carol Gilligan, *In a Different Voice*.").

¹¹³ See DEAN G. PRUITT & PETER J. CARNEVALE, *NEGOTIATION IN SOCIAL CONFLICT* 105-18 (1993) (explaining the "dual concern" model is designed to predict the type of negotiation strategy that a person might choose based on the party's concern about her own outcomes and about her counterpart's outcomes); Christine Rack, *Negotiated Justice: Gender and Ethnic Minority Bargaining Patterns in the Metrocourt Study*, 20 HAMLINE J. PUB. L. & POL'Y 211, 218-236 (1999); Larry Crump & Jeff Giddings, *Strategy, Choice, and the Skilled Legal Negotiator*, 31 MONASH U. L. REV. 258, 262-264 (2005).

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[T]he growing strength of women's voice in the legal profession may change the adversarial system into a more cooperative, less war-like system of communication between disputants in which solutions are mutually agreed upon rather than dictated by an outsider, won by the victor, and imposed upon the loser.¹¹⁴

This is a progressive vision of structural change in the legal system, motivated by a desire to see dispute resolution processes "promot[e] and maximize[e] human interactions that are creative, enfranchising, enriching, and empowering, rather than alienating and conflict-provoking."¹¹⁵ If we extend the metaphor, cultural feminist negotiation is also a one-way street, but it runs the opposite way: women's place is static, men's place is shifting, and men have a long way to go. This means M/F, $M > F$, and we should carry a brief for F by reversing normative value judgments and prescribing that men act female feminine: $F > M$ and $M \rightarrow F$.

D. *Moving Beyond the Traditional Approaches*

Against this critical backdrop and with the rapid institutionalization of ADR in American and Canadian legal procedure, more and more law and business schools are offering students the opportunity to learn the practice of principled negotiation, including the role of gender as a determinant of bargaining behavior in supervised experiential and clinical settings.¹¹⁶ Correspondingly, the traditional feminist approaches to sex/gender difference

¹¹⁴ Menkel-Meadow, *Portia in a Different Voice*, *supra* note 82 at 54-55.

¹¹⁵ *Supra* note 4 at 763. In the wake of subsequent developments in feminist legal theory, Menkel-Meadow moderated her views on the transgressive potential of women's ethic of care in the law after publishing *Portia in a Different Voice*; however, she has maintained that the ethic of care suggests a number of interesting implications for legal reform. See generally Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 VA. J. SOC. POL'Y & L. 75 (1994-1995); Menkel-Meadow, *What's Gender Got to Do With It?*, *supra* note 111.

¹¹⁶ Although lacking the transformative effects that its founders had predicted, virtually all law schools and many business schools in the United States and Canada now offer students the opportunity to learn ADR skills in a setting designed to focus simultaneously on the theory and practice of negotiation. See Carrie Menkel-Meadow, *The Legacy of Clinical Legal Education: Theories About Lawyering*, 29 CLEV. ST. L. REV. 555 (1980); Gary Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Methodology*, in CLINICAL EDUCATION FOR THE LAW STUDENT 374 (Counsel on Legal Education for Professional Responsibility, 1973).

in prescriptive negotiation analysis have found increasing purchase in law and business classrooms, where they continue to form part of basic skills training and shape professional outcomes everywhere. Prescriptions are historically based in an instructor's practical or political leanings: at bottom, liberal feminist negotiation amounts to women learning "men's ways" to fix themselves, while cultural feminist negotiation amounts to men learning "women's ways" to fix themselves and the system. The approaches lend themselves to corresponding negotiation "best practices" and classroom pedagogies that are widely accepted.

Having worked as a litigation lawyer and having studied, taught, and observed others teach about sex/gender difference in negotiation at several American and Canadian law schools, I understand how the traditional prescriptions are reflected in experiential lesson planning. My observation is that these lessons usually fail to capture the complexity of the issues at hand and have offended negotiation students, as a result, more than they led them to critique the role of gender in a productive way. I hope that this experience spurs others to ask whether liberal and cultural feminist negotiation, at least as they are historically conceived, may be psychically limiting and therefore detrimental to women and men in legal and business practice as well as politically problematic in ways that are readily apparent to students and others. In my view, these problems may be remedied if legal and business professionals conceptually allow for, conduct our practice in, and write and teach about situations in which it is useful to move beyond the traditional approaches.

To describe my experience at one leading law school, I have seen a revolving door of guest lecturers on the role of gender in negotiation, many employed as practitioners or consultants to white-shoe law firms and corporations, cycle through the classroom year after year. Their presentations were consistently panned. The most frequent objection was from students who felt misrepresented by lecturers' overbroad statements that "all women are and therefore should . . ." or "all men are and therefore should . . .," meant to apply widely and irrespective of individual or group differences. For example, I heard one instructor explain that "statistics show women are more conciliatory than men;"¹¹⁷ therefore, women should ask for what they want,¹¹⁸ "be as aggressive as the men on their team," and "not be afraid to 'lean into' professional salary negotiations."¹¹⁹ This kind of acritical,

¹¹⁷ See *supra* notes 53, 54, and accompanying text.

¹¹⁸ See BABCOCK & LASCHEVER, *supra* note 39; BABCOCK & LASCHEVER, *supra* note 47.

¹¹⁹ See SHELL, *supra* note 2, at 114; see SANDBERG, *supra* note 100 and accompanying text.

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instrumentalist advice is suggestive of the liberal feminist approach to negotiation. After the class, many students complained that this advice failed to take account of their more complicated and uniquely lived experiences as women, racialized minorities, or LGBTQ—to give three examples—because a racialized woman and a trans woman, let alone a racialized trans woman,¹²⁰ cannot simply “lean into” salary negotiations in the same way as a white cisgender woman when it may not be safe, productive, or even possible to do so. Another popular complaint was that the instructor’s advice failed to recognize how structural barriers in society have limited women’s pathways for success. These students asked why women were being told to act more aggressively (read: in a more masculine way) and to effectively follow the “rules of the game” (read: abide by current legal and business conditions that have impelled unfair and unequal bargaining processes and outcomes), instead of trying to change the rules or suggest a different game that was designed by and for the benefit of women or other historically marginalized groups.

These observations are evidence of a crisis in principled negotiation pedagogy today. Valuable learning opportunities are being lost because it is apparently too difficult to find instructors with expertise in both feminism and dispute settlement who can handle the subject matter of sex and gender differences, an immensely important topic, with the required sensitivity to generate thoughtful classroom discussion without significant controversy. This should not be rare expertise. Indeed, the situation appears to be so grave that several leading law and business schools have given up trying to teach about sex and gender in principled negotiation entirely.¹²¹ The fact is particularly striking if one considers that law and business teachers of other subjects routinely explore controversial issues in social role theory, oppositional ethics, sex inequality, and feminist reforms in a sophisticated and meaningful way. Yet, it appears these issues as applied in the ADR context raise unique and serious concerns for the future development of experiential education in the United States and Canada.¹²²

Contributing to the crisis is that many law and business schools still place a low (or, in some cases, zero) hiring priority on the dispute resolution field, such that their negotiation instructors are almost exclusively adjuncts

¹²⁰ See sources cited *infra* note 157 and accompanying text.

¹²¹ I have confirmed this fact and the reasons for it through conversations with law professor colleagues across the United States and Canada.

¹²² Several negotiation scholars have offered valuable insights and recommendations on experiential negotiation teaching as it relates to actual or perceived gender difference in performance. See e.g. Menkel-Meadow, *Teaching about Gender*, *supra* note 18, at 364-370; Cohen, *An (Un)Useful Category*, *supra* note 10, at 191-196.

drawn from the local litigation bar or consultancy population and not the permanent tenured or tenure-track faculty. These instructors may take a more “pragmatic” view of the subject as Kirby does above, reproducing a quick-fix, executive, “lunch and learn” teaching style based in their legal or professional experience and normalizing bias. They may correspondingly lack the necessary training in sex equality, critical race theory, queer studies, and other fields to critically examine the traditional approaches to sex/gender difference in principled negotiation, and specifically the liberal feminist approach that bears down on women (and men) in the male-dominated legal system and professional cultures in often subtle ways.¹²³ Or perhaps more likely, they may have heard various criticisms of the traditional approaches, but they have dismissed them as idealistic, impractical, or otherwise irrelevant to teaching about negotiation in the “real world” where methodologies founded on sex/gender difference continue to be practiced and where overt or covert masculinist imperatives remain largely unchallenged.

The pedagogical issues we are experiencing are symptomatic of a constitutive theory problem with the traditional approaches as they are most often studied, practiced, and taught in the United States and Canada. Put simply, the imaginative constraints of the ontological principle of sex/gender difference, M/F, have unduly limited our range of critical inquiry about the role of sex and gender in principled negotiation theory and practice. To the extent that researchers identify so-called “masculine” and “feminine” traits or tendencies and attribute them to male and female bodies, it appears inevitable that overbroad generalizations about gender determinants will be made, leading to normative prescriptions about principled negotiation “best practices” that do not apply to every negotiator.¹²⁴ The binary M/F can tell us little about gender non-conforming individuals who enact inconsistent, potentially confusing, and conceptually novel gender forms, or individuals whose gender expressions are filtered through one or more intersectional identities or experiences, except to highlight their continued theoretic and practical elision in principled negotiation studies. These individuals are the

¹²³ I am not the first comment on the need for lecturers on gender in principled negotiation to have some familiarity with feminist legal studies. See Menkel-Meadow, *Teaching about Gender*, *supra* note 18, at 360.

¹²⁴ Many theories of gender difference that rely on statistical analysis for their generalized and extrapolated propositions about men and women and the apparent causes of sex and gender inequality suffer from essentializing tendencies. See Amy J. Cohen, *Must We Ask?: Revisiting the Role of Gender in Negotiating*, 10 DISP. RESOL. MAG. 29, 30 (2004) (reviewing BABCOCK & LASCHEVER, *supra* note 39) [hereinafter Cohen, *Must We Ask?*].

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"gender-benders:" men and women who may be stereotypically masculine or feminine or neither or both, whether by incident or inclination, but in their defiance of statistical norms they are disappeared by ADR theories that conflate birth-sex designations with fixed gender expectations.¹²⁵ By calling them into prominence, I hope to show that all male and female negotiators should learn to gender-bend for themselves.

This is both a practical and political imperative. To the extent the traditional approaches highlight real or perceived sex/gender difference without interrogating the means of its construction, they effectively reinforce gender hierarchy as a "natural" or "necessary" fact by perpetuating harmful sex-based stereotypes that have traditionally disempowered all women and gender-benders at the bargaining table.¹²⁶ Separate spheres ideology has long suggested that men are agentic, independently oriented, and concerned with mastery and control, while women are communal, interpersonally oriented, and concerned with the welfare of others.¹²⁷ And so the stereotype easily

¹²⁵ See generally Case, *supra* note 46.

¹²⁶ See generally Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L.J. 471, 489 (1990) ("Most stereotyping involves a two-step process: categorization and attribution. The first step is the actual categorization of individuals into groups, usually expressed as opposites . . . The second step involves the attribution of certain traits (e.g., personality characteristics, intentions, goals, motivations, attitudes) to persons by virtue of the group into which they have been categorized. Sex stereotyping in the workplace is embedded in a complicated matrix of interlocking beliefs that reflect this two-step process."). For critical applications of sex-based stereotyping theory to female and feminine lawyering and dispute resolution models, see Albert, *supra* note 45, at 295, 299–303; Naomi R. Cahn, *Theoretics of Practice: The Integration of Progressive Thought and Action: Styles of Lawyering*, 43 HASTINGS L.J. 1039, 1050–54 (1992); Scales, *supra* note 87, at 1380–1383.

¹²⁷ See Sandra Lipsitz Bem, *The Measurement of Psychological Androgyny*, 42 J. PSYCHOL. 155, 156–157 (1974). The Bem Sex-Role Inventory is the most frequently cited measure in sex-role research. It lists the following qualities as identified masculine: self-reliant, of strong personality, defends one's beliefs, forceful, independent, analytical, athletic, possessing leadership abilities, assertive, and willing to take risks. The following qualities are identified as feminine: affectionate, cheerful, compassionate, flatterable, gentle, gullible, childlike, loyal, sensitive to others' needs, shy, soft spoken, sympathetic, tender, understanding, warm, and yielding. For more on the content and construction of sex-based stereotypes, including analyses in professional contexts, see generally ELEANOR EMMONS MACCOBY & CAROL NAGY JACKLIN, *THE PSYCHOLOGY OF SEX DIFFERENCES* 228, 234 (1974); JOHN E. WILLIAMS & DEBORAH L. BEST, *MEASURING SEX STEREOTYPES: A MULTINATION STUDY* (1990); Sallyanne Payton, *Releasing Excellence: Erasing Gender Zoning From the Legal Mind*, 18 IND. L. REV. 629, 633 (1985); JOHN E. WILLIAMS & DEBORAH L. BEST, *MEASURING SEX STEREOTYPES: A MULTINATION STUDY* (1990); Lee E. Teitelbaum et al., *Gender, Legal Education and Legal Careers*, 41 J. LEGAL EDUC. 443, 446 (1991); Laurie Rudman, *Self-Promotion as a Risk Factor for*

follows that male negotiators are more assertive, interrupting, status affirming, reliant on abstract reasoning and objective criteria, and more effective at leveraging competitive, distributive bargaining, “hard power” skills, while female negotiators listen more, pay greater attention to emotional rapport, take turns when speaking, emphasize relationship building, and are more effective at leveraging collaborative, integrative bargaining, “soft power” skills. As outlined in the chart above, empirical studies in negotiation that conflate sex/gender seem to reflect these widely-held beliefs.¹²⁸ In a classic formulation, Richard Wasserstrom argued that rigid sex/gender identities impose functional limits on what men and women can and should become:

Any substantially non-assimilationist society will make one’s sexual identity an important characteristic, so that there are substantial psychological, role, and status differences between persons who are males and those who are females. Even if these could be attained without systemic dominance of one sex over the other, they would, I think, be objectionable on the ground that they necessarily impaired an individual’s ability to develop his or her own characteristics, talents, and capacities to the fullest extent to which he or she might desire.¹²⁹

In the dispute resolution context, the key to effective bargaining is the ability to adapt personal “characteristics, talents, and capacities” unmoored from sex/gender identities as only gender-benders can. And where we continue to need progressive feminist interventions to address unfairness and inequality

Women: The Costs and Benefits of Counterstereotypical Impression Management, 74 J. PERSONALITY & SOC. PSYCHOL. 629, 629–630 (1998); Madeline E. Heilman, *Description and Prescription: How Gender Stereotypes Prevent Women’s Ascent Up the Organizational Ladder*, 57 J. OF SOCIAL ISSUES 657, 658–670 (2001); Alice H. Eagly & Steven J. Karau, *Role Congruity Theory of Prejudice Toward Female Leaders*, 109 PSYCHOLOGICAL REVIEW 573, 573–576 (2002).

¹²⁸ Numerous scholars have warned that stereotypical assumptions about gender difference influence the perceptions of both researchers and participants, often leading to erroneous results and interpretations of them. See MACCOBY & JACKLIN, *supra* note 127, at 3–8; CORDELIA FINE, *DELUSIONS OF GENDER: HOW OUR MINDS, SOCIETY, AND NEUROSEXISM CREATE DIFFERENCE*, xxiv–xxv (2010); REBECCA M. JORDAN-YOUNG, *BRAIN STORM: THE FLAWS IN THE SCIENCE OF SEX DIFFERENCE*, xii–xiii (2010).

¹²⁹ Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581, 614 (1976–1977).

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in bargaining processes and outcomes, one means of effective advocacy is the ability to subvert sex gender identities as gender-benders can.

To be clear, my intention is not to refute the ontological structure of M/F as a basis for critiquing interactional and institutional dynamics *writ large*, as there is great potential in difference feminist theory to empower women in the nominative category "F" to describe their distinct experience of identity, morality, and ethics.¹³⁰ Many difference feminists have done so and should continue to do so by exposing the incidents of sex and gender inequality, $M > F$, in many social and cultural contexts.¹³¹ My claim is that because the traditional approaches to sex/gender difference in principled negotiation define their advocacy in terms of M/F, $M > F$, and carrying a brief for F *exclusively*, they circumscribe the range of conceptual tools with which negotiators may critically assess their bargaining behavior, expand their strategic repertoire, and effect political change.¹³² As such, this article explores alternative means of resistance *not instead* of difference feminism necessarily, but *in addition* to it,¹³³ in order to direct more sustained critical attention to the political discourses of gender in principled negotiation theory and practice that may enable or constrain us from meeting our full potential.

¹³⁰ Amy Cohen made the same point in her critique of gender in negotiation. See Cohen, *An (Un)Useful Category*, *supra* note 10, at 191 ("[A]bandoning the idea of gender as a social function of opposites is not the same as abandoning inquiry into gender performance as a function of culture and social behavior.").

¹³¹ See Littleton, *supra* note 92, at 1333. (arguing that it is not the fact of real or imagined gender difference that creates the divide between women and men, but the differential impact that gender makes; if the identification of a person, action, tendency, or trait as female or feminine did not entail her/his/its immediate devaluation, then the identification itself would not be problematic).

¹³² As Judith Butler explains about identitarian feminist models that identity may be powerfully transgressive where it produces a rallying point, F, in certain women's solidarity contexts, but it may be powerfully limiting where identity operates as the normalizing category of structures around F that oppress women in other contexts, such as this, by limiting their access to conceptual tools. See Butler, *Imitation and Gender*, *supra* note 11, at 13-14.

¹³³ I endorse what Biddy Martin has offered as a rationale for queer "postfeminist" work. That is, to "suspend or defer questions about what [other lines of inquiry] have to do with women or gender long enough to make our analysis of gender and sexuality [and negotiation] new again and supple enough to help us intervene usefully in those developments." See Martin, *Success and its Failures*, in BRONFEN & KAYKA, *supra* note 11, at 371.

III. A POSTMODERN FEMINIST CRITIQUE OF GENDER IN PRINCIPLED NEGOTIATION

A. *Anti-Identitarian Theories and Applications*

The traditional liberal and cultural feminist approaches to gender in principled negotiation have features that work against the goal of increasing the range of practical and political expressions available to women and men. Chief among them, they presume that “sex/gender” is a reliable axis on which to model dispute resolution processes. Both the imperatives that we should “fix the woman” and “fix the system around the woman” imply that the different sexes/genders are discernible, describable, and discrete; they are socially constructed and therefore psychologically predictable. After all, the underlying difference feminist theory would be problematized if the elemental variables, M and F, were shown to be unfixed, unstable, or capable of signifying multiply. This means that the traditional praxis of gender in negotiation is fundamentally *identitarian*. It aims to bridge the difference between men and women, M/F, and to disrupt gender hierarchy, M > F, by specifically improving *women’s* place at the bargaining table, carrying a brief for F *alone*. This discourse is separatist and minoritizing in its recognition of the “female/feminine” as a distinct and coherent group affiliation, underscoring the ways that sex/gender difference produces the inequality women experience that it deems necessary to base its brand of feminist identity politics.¹³⁴ The byproduct of this strategy is that it allows for traditional negotiation advice and models of reform that are definitionally derived in identity alone. As described, either M or F only has a long way to go—not both, and nothing in between.

My postmodern feminist critique tries to dissociate male bodies, masculine traits and tendencies, and sex/gender hierarchy from one another, rendering negotiation a domain in which traditionally sexed/gendered

¹³⁴ See discussion *infra* note 201. My characterization of the traditional feminist approaches to gender in negotiation as “separatist” and “minoritizing” apply concepts introduced in Eve Kosofsky Sedgwick’s work on the “double bind.” The idea is that progressive social movements are trapped between prevailing and conflicting conceptions that define the current politics of our social and cultural organization. Sedgwick argues that in respect of gender and sexuality, this incoherence operates on different levels between “separatist” and “integrative” and between “minoritizing” and “universalizing” discourses. See SEDGWICK, EPISTEMOLOGY OF THE CLOSET, *supra* note 11, at 85-90.

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expressions are transitory.¹³⁵ It applies Eve Kosofsky Sedgwick's vision of human sexuality that, as Janet Halley put it much later, "takes a break"¹³⁶ from difference feminism and leads Sedgwick to advocate, controversially, in favor of suspending gender as a viable category of analysis altogether.¹³⁷ Sedgwick does not understand gender as a biologically determined or socially constructed difference, but rather as a dyadic and diacritical distinction in which the meaning of "masculine" depends on it being other than "feminine," in which the superordination of M depends on its being other than the subordination of F, as concepts understood only in contingent relation as designating the absence of characteristics implied by the other.¹³⁸

¹³⁵ It may be said that the organizing principle of queer theory is its anti-identitarian impulse. See generally Butler, *Imitation and Gender*, *supra* note 11, at 14; SEDGWICK, *TENDENCIES*, *supra* note 11, at 27; Suzanna Danuta Walters, *From Here to Queer: Radical Feminism, Postmodernism, and the Lesbian Menace (Or, Why Can't a Woman Be More Like a Fag?)*, 21 *SIGNS* 830, 837 (1996) ("Many would argue that this indeterminacy—this inability to ascertain a precise definition and framework for the term *queer*—is precisely what gives it its power: *queer* is many things to many people, irreducible, undefinable, enigmatic, winking at us as it flouts convention: the perfect postmodern trope, a term for the times, the epitome of knowing ambiguity."). See generally HALLEY, *SPLIT DECISIONS*, *supra* note 11, at 112-114. (tracing the divergence of queer theory from identitarian theories of gender and sexuality, both feminist and non, including discussion of how they seek the welfare of different sexual subjects).

¹³⁶ I borrow this phrase from HALLEY, *SPLIT DECISIONS*, *supra* note 11. It should be apparent to those who read Halley's work that her suggestion we "take a break" from feminism, as Halley argues Eve Kosofsky Sedgwick and others did, does not mean to reject feminism altogether. It means that we temporarily suspend feminism so that we may explore aspects of gender and sexuality that may resound in other terms, rather than "kill it, supersede it, abandon it; immure, immolate, or bury it." *Id.* at 10.

¹³⁷ To open up lines of anti-homophobic inquiry, Sedgwick argues that to suggest heteronormative sexuality is embodied male dominance and female submission, M > F, and therefore constitutive of actual or perceived gender difference, M/F, presupposes that sexuality is in its base form heterosexuality. Therefore, Sedgwick writes "[i]t may be ... that a damaging bias toward heterosocial or heterosexist assumptions inheres unavoidably in the very concept of gender." SEDGWICK, *EPISTEMOLOGY OF THE CLOSET*, *supra* note 11, at 31. See also BUTLER, *GENDER TROUBLE*, *supra* note 11, at 22-23. Sedgwick and Butler were responding here, in part, to difference feminist theories that viewed sexuality as the linchpin of gender inequality. See MacKinnon, *Feminism, Marxism, Method and the State*, *supra* note 87, at 516, 530-531.

¹³⁸ SEDGWICK, *EPISTEMOLOGY OF THE CLOSET*, *supra* note 11, at 31. See also HALLEY, *SPLIT DECISIONS*, *supra* note 11, at 136. This builds off of Ferdinand de Saussure's work in linguistics, and in particular his idea that meanings given to paired opposite words are relational. See generally FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* 127 (Charles Bally & Albert Sechehaye eds., Roy Harris trans., 1983); FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS*, 128 (Charles Bally

This means the sex/gender difference perspective is incompatible with intra-sex or intra-gender group experiences because the perspective's interface with relations between a racialized man and trans woman at the bargaining table, say, in the richness and diversity of their experiences, is less clear, may be less relevant, and does not permit a more nuanced analysis of events irreducible to the terms M/F.¹³⁹ One application of Sedgwick's theory is that any mapping of characteristics along the diacritical frontier of sex/gender—or as I have depicted it, the conventional opposition of male/masculine and female/feminine principled negotiation behaviors in the above chart—is an ideological trap. It gives the principle of sex/gender difference, M/F, and the hierarchical organization of “men's ways” over “women's ways,” M > F, “a conceptual privilege of incalculable consequence” that it does not deserve.¹⁴⁰ It also suggests the ontology of sex/gender difference in principled negotiation is a structuralist invention and therefore must be susceptible to deconstruction.

One means to do this is suggested by Judith Butler, who uses the cultural practice of drag to trouble the concepts of “natural” or “necessary” gender. Butler argues that drag kings and drag queens do more than imitate female/feminine and male/masculine identities as their diacritical opposites, but they reveal how all women and all men imitate these identities as well.¹⁴¹ Gender is revealed to be an *activity* that is inscribed on individuals by sustained repetitions that are performative in nature,¹⁴² such that neither

& Albert Secheyaye eds., Wade Baskin trans., 1974); ROBERT SCHOLES, *STRUCTURALISM IN LITERATURE: AN INTRODUCTION* (1974).

¹³⁹ See SEDGWICK, *EPISTEMOLOGY OF THE CLOSET*, *supra* note 11, at 32.

¹⁴⁰ *Id.* at 31. See also MALCOLM EVANS, *SIGNIFYING NOTHING: TRUTH'S TRUE CONTENTS IN SHAKESPEARE'S TEXT* 167 (1986): (“[A] feminism which operates outside the post-structuralist critique of the subject and the sign runs the risk of inadvertently reproducing the more fundamental aspects of the discourse nominally under attack, while also disregarding modalities of the text that could be used to reinforce the theoretical challenge.”); Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1209 n.208 (1998) (arguing that sex-based stereotypes contribute to the hierarchical organization of male/masculine over female/feminine norms.)

¹⁴¹ See Butler, *Imitation and Gender*, *supra* note 11, at 21 (arguing that drag reveals there to be no original or primary gender that is not “appropriated, theatricalized, worn, and done”); Sarah E. Chinn, *Gender Performativity*, in *LESBIAN AND GAY STUDIES: A CRITICAL INTRODUCTION* 294, 300-01 (Sally R. Munt & Andy Medhurst eds., 1997) (A drag queen states, “If you think my pretending to be a woman is hard, think what an effort it must be for a woman to do.”)

¹⁴² Butler centers her discussion of performativity on J. L. Austin's now standard definition of “performative” speech, which are words that *do* what they *say* and therefore enact change. Austin and Butler argue that performativity is never a singular action, but requires repetition as a normalizing practice to convey the authoritative force of its own

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M nor F can attain the status of pure, pre-social, or pre-cultural gender reality. Drag marks the dissolution of gender identity itself by displacing and replacing its normative cultural configurations, M and F, such that even these will generate their own constitutive resistances.¹⁴³ Butler's theory echoes a more dynamic conception of power suggested by Michel Foucault, that is exercised not only along the vertical axis of male domination and female subordination through juridical force (M > F, what Foucault calls "*puissance*"), but also along a highly fragmented horizontal "field of force relations" between discursive modes of behavior (what Foucault calls "*pouvoir*") as if "transitory points of resistance, producing cleavages in a society that shift about."¹⁴⁴ This revision of power-as-*pouvoir* is diffused through social and cultural institutions, through innumerable and replaceable "microtechniques" to which the docile pre-gendered and re-gendered body is subjected.¹⁴⁵ Accordingly, Butler writes that gender is contingently constituted through discursive effects in a process of signification: "gender is the repeated stylization of the body, a set of repeated acts within a highly rigid regulatory frame that congeal over time to produce the appearance of substance, or a natural sort of being."¹⁴⁶ In other words, men and women write their genders onto their birth-sexes by enacting diacritical distinctions at the bargaining table, and there may be no hierarchical organization with respect to which congealed gender reality, M or F in principled negotiation

attempted doing. See generally J. L. AUSTIN, HOW TO DO THINGS WITH WORDS (J.O. Urmson & Marina Sbisa eds., 1975); Judith Butler, *Burning Acts: Injurious Speech* in PERFORMATIVITY AND PERFORMANCE (Andrew Parker & Eve Kosofsky Sedgwick eds., 1995).

¹⁴³ See TERESA L. EBERT, LUDIC FEMINISM AND AFTER: POSTMODERNISM, DESIRE, AND LABOR IN LATE CAPITALISM 216 (1996).

¹⁴⁴ FOUCAULT, THE HISTORY OF SEXUALITY, *supra* note 11, at 96. Foucault rejected the trite point that "power is everywhere" as a misreading of his work, stating instead that "I scarcely use the word *power*, and if I use it on occasion it is simply as shorthand for the expression I generally use: *relations of power*." See Foucault, *The Ethics of the Concern for the Self as a Practice of Freedom* (P. Aranov & D. McGrawth trans.), in MICHEL FOUCAULT, ETHICS: SUBJECTIVITY, AND TRUTH (Paul Rabinow ed.), in 1 THE ESSENTIAL WORKS OF MICHEL FOUCAULT 1954-1984, 291 (Paul Rabinow ed. 1994) [hereinafter Foucault, *The Ethics of Concern for Self*].

¹⁴⁵ The "microtechniques" of political power, which I frame here as a gendering power, can be compared to Foucault's "hundreds of tiny theatres of punishment" in the French Revolution, oppressing and liberating at once. See generally MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 135-194 (Alan Sheridan trans., 1979).

¹⁴⁶ BUTLER, GENDER TROUBLE, *supra* note 11, at 32-33. Butler articulates her theory of the materiality of the body as an "effect" of power – or rather, as "power in its formative and constituting effects" – more fully in her later work. See BUTLER, BODIES THAT MATTER, *supra* note 11, at 2, 9, 34, 251.

theory and practice, is the more false.¹⁴⁷ While Butler veers between resistance and endorsement of the consequential feminist politics of her anti-identitarian theory,¹⁴⁸ as I do later in this article,¹⁴⁹ the key point of her critique is that M and F are unfixed and unstable “subjects” that describe nothing essential about the body. She writes, “[w]hen the constructed status of gender is theorized as radically independent of sex, gender itself becomes a free-floating artifice, with the consequence that “man” and “masculine” might just as easily signify a female body as a male one, and “woman” and “feminine” a male body as easily as a female one.”¹⁵⁰

Applying these ideas, if we disaggregate the elements that have traditionally defined negotiators’ identities from their sex/gender categories, it appears that these elements broken down and listed in the same order as the chart above would include the following:

- “your biological (e.g. chromosomal) sex, male or female”;
- “your self-perceived gender assignment, male or female (once supposed to be the same as your biological sex)”;

¹⁴⁷ See BUTLER, GENDER TROUBLE *supra* note 11, at 40; FOUCAULT, THE HISTORY OF SEXUALITY, *supra* note 11, at 100-01. See also Cohen, *An (Un)Useful Category*, *supra* note 10, at 190 (“Each time we perform ourselves through language in negotiations to conform to (or challenge) compelled social expectations we (re)constitute our (gender) identity. But because there is no core or psychic “I” underneath our performance, each continuous repetition --although maintaining the illusion of a seamless self (e.g., “woman”) -- places identity at risk by virtue of its social/temporal compulsion to repeat.”) But see JANA SAWICKI, DISCIPLINING FOUCAULT: FEMINISM, POWER, AND THE BODY 59 (1991) (arguing that male domination may stem from “power relations at the microlevel of society,” as an implicit assumption of greater falseness attaches to the female/feminine).

¹⁴⁸ What I call Butler’s “postmodern feminist” or “queer-feminist” work, as the labels imply, demonstrates this equivocal quality. See BUTLER, GENDER TROUBLE, *supra* note 11, at 23 (“If sexuality is conceived as liberated from gender, then the sexuality that is ‘liberated’ from feminism will be one which suspends the reference to masculine and feminine, reinforcing the refusal to mark that difference, which is the conventional way in which the masculine has achieved the status of the ‘sex’ which is one.”); Butler, *Imitation and Gender*, *supra* note 11, at 19 (“But *politically*, we might argue, isn’t it quite crucial to insist on lesbian and gay identities precisely because they are being threatened with erasure and obliteration from homophobic quarters? Isn’t the above theory *complicitous* with those political forces that would obliterate the possibility of gay and lesbian identity?”).

¹⁴⁹ See *infra* Section III.C, An Identity-Equivocal Politics.

¹⁵⁰ BUTLER, GENDER TROUBLE, *supra* note 11, at 6.

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- “the preponderance of your traits of personality and appearance, masculine or feminine (once supposed to correspond to your sex and gender)”,¹⁵¹
- your individual or group affiliation with any number of demographic identifications, (once supposed to correspond to your own identity);
- your expertise, connection, or other relation with the subject matter of the negotiation (once supposed to correspond to your own identity and contingently for men and women lines when sex/gender is salient to the dispute);
- the biological sex of your negotiating counterpart;
- the gender assignment of your negotiating counterpart;
- the masculinity or femininity of your negotiating counterpart;
- your perception of your own and your counterpart's bargaining capacities (once supposed to correspond to your own and your counterpart's sex/gender);
- your orientation toward competitive situations, and the frequency with which you engage in them (once supposed to be positively oriented and more frequently engaging if male/masculine, negatively oriented and less frequently engaging if female/feminine);
- your tendency to “ask” during negotiations (once supposed to ask for more and set higher targets if male/masculine, ask for less and set lower targets if female/feminine);
- your level of risk aversion (once supposed to be less averse if male/masculine, more averse if female/feminine);

¹⁵¹ These first three bullets are lifted from Sedgwick's similar “exploding list” in *Tendencies*, discussed below, that Sedgwick designed to disaggregate and therefore exert pressure on the congealing elements of “sexual identity.” See SEDGWICK, *TENDENCIES*, *supra* note 11, at 6-8.

- your willingness to settle (once supposed to be more willing if male/masculine, less willing if female/feminine);
- your nonverbal communication tactics (once supposed to use more dominant signs if male/masculine, less dominant signs if female/feminine);
- the loudness and other aspects of your voice, as well as your sensation and perception of your negotiating counterpart's voice (once supposed to use louder voices and consider loud voices to be less aggressive if male/masculine, softer voices and consider loud voices to be more aggressive if female/feminine);
- your length and manner of speaking (once supposed to speak longer if male/masculine, shorter if female/feminine);
- your tendency to interrupt or be interrupted (once supposed to interrupt more frequently if male/masculine, be interrupted more frequently if female/feminine);
- your tendency to project doubts or to project certainty during negotiations (once supposed to downplay doubts if male/masculine, downplay certainty if female/feminine);
- your tendency to exert control over subject matter (once supposed to exert more control if male/masculine, less control if female/feminine);
- your tendency to use threats or derogatory put-downs in negotiations (once supposed to use more threats and put-downs if male/masculine, less threats and less put-downs if female/feminine);
- your recourse to abstract and objective or relational and subjective markers in your dealings with other people (once supposed to emphasize abstract and objective criteria if male/masculine, relational and subjective needs if female/feminine);
- your interest in winning or in maintaining a good relationship with your negotiating counterpart (once supposed to be more

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concerned with winning if male/masculine, more concerned about maintaining a good relationship if female/feminine);

- your comparative valuation of equity and equality in negotiated outcomes (once supposed to value equitable distributions that reflect pertinent power imbalances if male/masculine, equal distributions even when possessing greater economic strength if female/feminine);
- your allocation of resources between negotiating parties (once supposed to divide in a self-serving way if male/masculine, in an equal way if female/feminine);
- your win-win or win-lose orientation (once supposed to be win-lose oriented if male/masculine, win-win oriented if female/feminine);
- your general disposition toward negotiation and inclination to negotiate (once supposed to be more positively disposed and initiate more often if male/masculine, less positively disposed and initiate less often if female/feminine);
- your inclination to negotiate for yourself (once supposed to be more likely if male/masculine, less likely if female/feminine);
- your feelings of confidence and success (once supposed to feel more confident and successful if male/masculine, less confident and successful if female/feminine);
- your level of self-efficacy about negotiating ability (once supposed to feel higher self-efficacy if male/masculine, lower self-efficacy if female/feminine);
- “and—again—many more.”¹⁵²

Sedgwick made use of a similar “exploding list” technique in her own work to disaggregate the elements of “sexual identity” into its independent

¹⁵² *Id.* at 8. By leaving the list open to new and future additions, Sedgwick suggests that the independent elements of sexual identity, like the independent elements of negotiation identity, are unlimited.

fragments.¹⁵³ Halley explains the operation of Sedgwick's exploding lists in this way: "each of th[e] vertically disarticulated elements comes with a parenthetical aside, the horizontal dimension, which reveals it to be less ontological—less a new 'fact' about sexual identity that has to be added to our understanding of reality—than ideological, a supposition, a funny idea we have and could probably ditch."¹⁵⁴

I read the above list as exploding the binary structure of sex/gender difference in principled negotiation, M/F, into an expandable series such that for individual male and female negotiators, any one element traditionally associated with M or F could switch to F or M or morph into something else entirely without predetermining the gender outcome of any other element in the series.¹⁵⁵ It follows that if certain liberal and cultural feminist approaches to negotiation are transfixed by the stereotypically "rational, competitive, self-maximizing, hard-bargaining, masculine male negotiator" called M, and the stereotypically "emotional, collaborative, relational, soft-bargaining, feminine female negotiator" called F, as mystified figures constituted by sexed/gendered elements, a postmodern feminist approach would make room for these characteristic constellations but is equally if not more interested in other prospective and shape-shifting modes of being. Consider, for example, the "creative, emotional, thrill-seeking cisgender male, biracial account manager with a relatively quiet voice, who is interested in fostering a long-term business relationship." Or consider the "analytical, conventionally attractive, profit-driven, transgender female, bisexual general counsel, born in Japan and a two-time cancer survivor, who is prepared to litigate." Disaggregating sex and gender means that the constituent elements of a negotiator's identity cannot signify monolithically,¹⁵⁶ but will dynamically interact with demographic factors including race, class, language, ethnicity, sexuality, culture, relationships, power, status, professionalism, ethics, and others, where even more dizzying, dazzling intersections are possible.¹⁵⁷ As

¹⁵³ *Supra* note 151 and accompanying text.

¹⁵⁴ HALLEY, *SPLIT DECISIONS*, *supra* note 11, at 204.

¹⁵⁵ *Id.*

¹⁵⁶ SEDGWICK, *TENDENCIES*, *supra* note 11, at 25.

¹⁵⁷ This principle reflects the imperative in feminist literature since the mid-1980s, both inside the law and out, to complicate studies of gender and sexuality with intersecting acts, identities, and oppressions. *See generally* Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (2d ed. 2000); Angela Y. Davis, *Women, Race, and Class* (1983); bell hooks, *Feminist Theory: From Margin to Center* (2d ed. 2000); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Marlee Kline, *Race, Racism, and Feminist Legal Theory*, 12 HARV. WOMEN'S L. J. 115 (1989); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women*

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Halley puts it, the elements “ramify in an unimaginably large number of directions,” and the “exploded list launches an open-ended trajectory ending with implicit ellipses leading out to infinity.”¹⁵⁸

If we accept that these affects pose a challenge to the sex/gender framework, then we should question the theoretical premises of any attempts at compromise that imply only one sexed or gendered space—any one new, idealized domain—which male and female negotiators should mobilize linearly into.¹⁵⁹ Consider the alternatives. In liberal feminist theories of negotiation, maleness/masculinity is endorsed at the expense of potentially useful female/feminine expressions which are devalued. In cultural feminist theories of negotiation, female/femininity is endorsed at the expense of useful male/masculine expressions which are devalued. The postmodern feminist perspective would be cautious about, if not reject outright, any separatist and minoritizing impulse to isolate F identity and carry a brief for it, either by encouraging her to assimilate “men’s ways” of negotiating, F→M, or by encouraging him to assimilate “women’s ways” of negotiating, M→F, in all cases. Neither of these models can accommodate the full spectrum of bargaining behaviors as equally valued.

of Color, 43 STAN. L. REV. 1241 (1991); CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing, ed., 1996); Evangelina Holvino, *Complicating Gender: The Simultaneity of Race, Gender, and Class in Organization Change(ing)* (Center for Gender in Organizations, Working Paper No. 12, 2001); Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN’S L.J. 191 (1989-1990); Joanne Conaghan, *Reassessing the Feminist Theoretical Project in Law*, 27 J. LAW & SOC’Y 351 (2000). This idea also borrows from innovative scholarship in cross-cultural negotiation, which has emphasized that gender status beliefs need to be elaborated beyond M and F to consider what happens when other characteristics become of interest. See generally Karen L. Proudford, *Notes on the Intra-Group Origins of Inter-Group Conflict in Organizations: Black-White Relations as an Exemplar*, 1 U. PA. J. LAB. & EMP. L. 615 (1998); Andrea Kupfer Schneider, Sanda Cheldelin & Deborah Kolb, *What Travels: Teaching Gender in Cross-Cultural Negotiation Classrooms*, 31 HAMLINE J. PUB. L. & POL’Y 531 (2010). A number of other scholars have recognized the failure of negotiation studies to address the intersectionality of sex and gender with other factors, if without critiquing the identitarian focuses of these studies as explicitly as I have. See, e.g., Folberg & Golann, *supra* note 12, at 187-188; Menkel-Meadow, *Women in Dispute Resolution*, *supra* note 30, at 8; Cohen, *Must We Ask?*, *supra* note 124, at 30; Kolb, *Too Bad for the Women*, *supra* note 8, at 516; Menkel-Meadow, *Teaching About Gender and Negotiation*, *supra* note 18, at 363.

¹⁵⁸ HALLEY, *SPLIT DECISIONS*, *supra* note 11, at 267.

¹⁵⁹ This idea is adapted from Judith Butler, who argued that any identitarian gesture of “coming out” necessitates a new spatial zone to be “in” which imposes its own costs. See Butler, *Imitation and Gender*, *supra* note 11, at 14-15.

These ideas are partly inspired by David Lax and James Sebenius's famous criticism that principled negotiation fails to address the so-called "Negotiator's Dilemma." As Lax and Sebenius describe it, the Negotiator's Dilemma is the fundamental tension that exists between prevailing and conflicting impulses to compete and to collaborate when resolving disputes.¹⁶⁰ Principled negotiation assumes these intuitions to be exclusive and defining of individual identities, corresponding to unique traits and tendencies that distinguish their respective ideological commitments. As Peter Adler puts it, "each . . . has its own logic, its own bargaining pattern, its own outlook and style, its own assumptions about human nature, its own explanation of conflict, its own theoreticians, and its own zealots."¹⁶¹ Lax and Sebenius explain that a dilemma arises when an identified "competitive" or "collaborative" negotiator must respond in situations where both strategic imperatives become salient in a dispute at the same time.¹⁶² They illustrate the push-and-pull as follows:

Negotiators and analysts tend to fall into two groups that are guided by warring conceptions of the bargaining process. In the left-hand corner are the "value creators" and in the right-hand corner are the "value claimers." Value creators tend to believe that, above all, successful negotiators must be inventive and cooperative enough to devise an agreement that yields considerable gain to each party, relative to no-agreement possibilities. Some speak about the need for replacing the "win-lose" image of negotiation with "win-win" negotiation, from which all parties presumably derive great value

¹⁶⁰ DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 29-30, 34 (1986). For additional treatment of the Negotiator's Dilemma as described by Lax and Sebenius, see generally ROBERT MNOOKIN, SCOTT PEPPET & ANDREW TULUMELLO, *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (2000); Charles B. Craver, *The Inherent Tension Between Value Creation and Value Claiming During Bargaining Interactions*, 12 CARDOZO J. CONFLICT RESOL. 1 (2010).

¹⁶¹ Adler's work has been excerpted or endorsed in a number of leading negotiation texts. See Adler, *supra* note 15, reprinted in *THE NEGOTIATOR'S FIELDBOOK* 17-27 (Andrea Kupfer Schneider & Chris Honeyman eds., 2006), and Frederick H. Zemans, *Representative Negotiators of Integrity*, in *THE THEORY AND PRACTICE OF REPRESENTATIVE NEGOTIATION* 105-106 (Colleen M. Hanyecz, Trevor C. W. Farrow & Frederick H. Zemans eds., 2008).

¹⁶² LAX & SEBENIUS, *supra* note 160, at 29-30.

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Value claimers, on the other hand, tend to see this drive for joint gain as naïve and weak-minded. For them, negotiation is hard, tough bargaining. The object of negotiation is to convince the other guy that he wants what you have to offer much more than you want what he has . . . To “win” at negotiation—and thus make the other fellow “lose”—one must start high, concede slowly, exaggerate the value of concessions, minimize the benefits of the other’s concessions, conceal information, argue forcefully on behalf of principles that imply favorable settlement, make commitments to accept only highly favorable agreements, and be willing to outwait the other fellow

Both of these images of negotiation are incomplete and inadequate. Value creating and value claiming are linked parts of negotiation. Both processes are present. No matter how much creative problem solving enlarges the pie, it must still be divided; value that has been created must be claimed. And, if the pie is not enlarged, there will be less to divide; there is more value to be claimed if one has helped to create it first. An essential tension in negotiation exists between cooperative moves to create value and competitive moves to claim it.¹⁶³

Here, Lax and Sebenius suggest it is a mistake to assume that equally legitimate and conventionally opposite views—two reciprocal and potentially “warring” modes of action—which are each “incomplete and inadequate” at expressing the full range of psychic qualities available to men and women on their own, properly belong to one group of negotiators and not the other. While Lax and Sebenius only rescue the attributes “value claiming” and “value creating” from ideological capture, I would argue that

¹⁶³ *Id.* at 30-32, 38-40. There are many iterations of the Negotiator’s Dilemma, but the most common in the negotiation scholarship are between claiming versus creating value (as Lax and Sebenius describe here), resilience versus flexibility in taking positions, following a prepared strategy versus pursuing new options opportunistically, being honest and forthright versus opaque and reticent, feeling trust versus distrust, and acting nobly versus selfishly. Many more are possible. See ROY J. LEWICKI, BRUCE BARRY, DAVID M. SAUNDERS & KEVIN TASA, *ESSENTIALS OF NEGOTIATION* 236-237 (Canadian ed., 2011). Other scholars have analogized the Negotiator’s Dilemma to the context of revealing interests versus concealing interests. See Robert H. Mnookin & Lee Ross, *Introduction*, in *BARRIERS TO CONFLICT RESOLUTION* 8 (Kenneth J. Arrow, Robert H. Mnookin, Lee Ross, Amos Tversky & Robert B. Wilson, eds., 1995).

we can just as easily rescue the other elements of a principled negotiator's sex/gender identity in the exploded list, such that all are shown to have a possible, if not necessary occurrence in most dispute resolution processes.¹⁶⁴ The Negotiator's Dilemma reflects the tension inherent in the traditional feminist approaches which represent the constituent elements of "men's ways" and "women's ways" as separate means and methods, while it is strategically necessary that we recognize their associated characteristics are alternately accessible to all of us.

This theory helps to discredit the popular suggestion that instead of "fix the woman" or "fix the system around the woman," we should consider how to design and enforce social, cultural, or legal systems that are built upon an elusive, enlightened middle ground. This is an attempt to strike the "right" balance between "men's ways" and "women's ways" along the horizontal dimension of each entry in the exploded list, such that our model negotiator is now an integrated, fully human, and symmetrically androgynous figure coloured in by an ideal shade of grey between the diacritical black and white ("A"). We might call this feminist negotiation theme, "*fix everyone around the androgyne*." This theme is reflected by prescriptions in the classroom that "men should learn to be more like women *and* women should learn to be more like men."¹⁶⁵ According to this theory, we should reject the M/F dualism altogether, assume that men and women are equally mobile and essentially the same, M=F, and aspire to a superior "third sex" model that combines all or some of the psychic qualities traditionally associated with male/masculine and female/feminine negotiators. In other words, this means that because $A > M$ and $A > F$, both men and women have a long way to go, and we should carry a brief for everyone by effectuating $M \rightarrow A$ and $F \rightarrow A$.¹⁶⁶

¹⁶⁴ A related point concerns the tensions that exist between potentially incompatible "conflict styles," such as those outlined in the widely used psychological test, the Thomas-Kilmann Conflict Mode Instrument: competing, collaborating, compromising, avoiding, and accommodating. See generally Melissa L. Nelken, *The Myth of the Gladiator and Law Students' Negotiation Styles*, 7 CARDOZO J. CONFLICT RESOL. 1 (2005). My application of the Negotiator's Dilemma could apply to this or any other relation between two or more prevailing and conflicting bargaining orientations that are necessary to resolve disputes.

¹⁶⁵ I have not found specific appeals to "androgyne" in the negotiation literature, but I offer the term for its analogy to popular prescriptions in negotiation classrooms, as described, as well as the term's extensive treatment by feminist theorists elsewhere.

¹⁶⁶ The model of androgyny that I discuss (and reject) in this section refers to the symmetrical assimilation of M and F rather than the asymmetrical alternation between M and F. The symmetrical model may have ancient origins, but Virginia Woolf's classic formulation of "spiritual cooperation," drawing on Samuel Taylor Coleridge's quest for

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This is not my position for three reasons. First, aspirations to "gender-neutral" codes of conduct that purport to blend equal parts black and white in an androgynous, "third sex" model are usually fictitious because they reflect an androcentric bias. If we unpack the idea of gender deconstruction in a manner that redefines traditional male/masculine negotiation behaviors as "androgynous," $M = A$, the problematic liberal feminist imperatives, $M > F$ and $F \rightarrow M$, remain but in the sameness feminist disguise, $A > F$ and $F \rightarrow A$.¹⁶⁷ Second, there is no one-size-fits-all negotiation best practice or strategy for reform called A which should be recommended, will be applicable, or may even be possible to express in every case, as interactional and institutional circumstances will change between them. Invariably, there will be situations in law and business where such a rigid, inflexible model of a

an organically whole, transcendent androgynous mind, may be the most compelling. See VIRGINIA WOOLF, *A ROOM OF ONE'S OWN* 128 (Oxford ed., 1998). The most influential modern proponent of symmetrical assimilation was psychologist Sandra Lipsitz Bem, who argued that the psychic combination of masculine and feminine qualities into the third category of sex-role identification, "androgyny," was most conducive to success and happiness. See generally Bem, *supra* note 127; Sandra Lipsitz Bem, *Sex Role Adaptability: One Consequence of Psychological Androgyny*, 31 J. PERSONALITY & SOC. PSYCHOL. 634 (1975). There is extensive contemporary feminist scholarship spanning several disciplines that explores the transformative potential of androgyny in both its symmetrical and asymmetrical forms. See generally CAROLYN G. HEILBRUN, *TOWARD A RECOGNITION OF ANDROGYNY* (1973); Judith M. Bardwick, *Androgyny and Humanistic Goals or Goodbye, Cardboard People*, in *THE AMERICAN WOMAN: WHO WILL SHE BE?* 61 (Mary Louise McBee & Kathryn A. Blake eds., 1974); Joyce Trebilcot, *Two Forms of Androgynism*, reprinted in *FEMINISM AND PHILOSOPHY* 70-78 (Mary Vetterling-Braggin, Frederick Ellison, & Jane English eds., 1977); Mary Ann Warren, *Is Androgyny the Answer to Sexual Stereotyping*, in "FEMININITY," "MASCULINITY," AND "ANDROGYNY" (Mary Vetterling-Braggin ed., 1982); James P. Sterba, *Reconciling Conceptions of Justice* in *MORALITY AND SOCIAL JUSTICE: POINT/COUNTERPOINT* 18-26 (James P. Sterba, Alison M. Jaggar, Carol C. Gould, Robert C. Solomon, Tibor R. Machan, William A. Galston, & Milton Fisk, eds., 1995); Olsen, *The Family and the Market*, *supra* note 93, at 1577-1578; Littleton, *supra* note 92, at 1291-93, 1302.

¹⁶⁷ See e.g. notes 83-87 and accompanying text on the perils of "gender-neutrality." Carrie Menkel-Meadow captures this idea most imaginatively: "The trouble with marble cake is that it never has enough chocolate; the problem with androgyny is that it never has enough 'womanness.'" Littleton, *supra* note 92, at 1302 (citing Carrie Menkel-Meadow, Address at the 15th National Conference on Women). See also Catharine Hantzis, *Is Gender Justice a Completed Agenda?* (Book Review), 100 HARV. L. REV. 690, 698 (1987) (reviewing ELINOR LENZ & BARBARA MYERHOFF, *THE FEMINIZATION OF AMERICA: HOW WOMEN'S VALUES ARE CHANGING PUBLIC AND PRIVATE LIVES* (1985)); Joan W. Scott, *Deconstructing Equality-versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism*, 14 FEMINIST STUD. 32, 45 (1988) [hereinafter Scott, *Deconstructing Equality-versus-Difference*].

negotiator's creative capacity will work against her client's interests, however enlightened the model appears. Finally, arguments from a "third sex" are an attempt to remedy one or more perceived deficiencies in the conceptions M and F by reinstituting a new identity that is similarly restrictive in its expressive potential. Rather than ellipses leading out to infinity, they impress a new and imposing clarity in the singular form A which permits no deviation. This ignores the postmodern feminist critique that gender is not a stable property of the self, but something properly understood as enacted by the practice of negotiation that is continuously evolving, lending itself to alternating bargaining tactics colored in by other, more occasional, kaleidoscopic shades than undifferentiated grey. Illusions of androgyny miss the crucial point.

That is, traditional male/masculine and female/feminine negotiation behaviors are mutually reiterative and no more authentic than drag. Their being "identified" at all is the original mistake. No trait or tendency properly belongs to one gender and so the endeavor should not be to "try on the other gender" as if the tried-on trait or tendency is someone else's property,¹⁶⁸ but it conceives of effective bargaining as the constant and improvisatory switching of abstracted activities, drawn from an infinitely expandable database of subversive potentialities in social, cultural, and legal life. This includes the capacity to shift between traditional male/masculine and female/feminine behaviors during the same negotiation and between different negotiations as needed, even if he or she may have a preceding, but of course not "natural" or "necessary" disposition in favor of one practice or the other. If men and women are recast as players in unbounded fields of action, the bargaining table becomes a site where all sorts of gender-bending expressions are possible. Postmodern feminist negotiation is to effectively transcend liberal feminist and cultural feminist theories of gender difference in which men and women are constitutively limited by bargaining "best practices" and strategies for reform that are exclusively one-directional. If we extend the metaphor again, no one party has only one way to go. This theory is a network of streets that are turning and twisting and intersecting at many intervals that are then demolished and repaved and turning and twisting again in a wild, discombobulating journey. There are many ways to go, and the thrill of the ride is in forgetting where you started.

¹⁶⁸ Butler, *Imitation and Gender*, *supra* note 11, at 21.

B. *Protean Negotiation*

There exists at least one model in the principled negotiation scholarship that reflects a postmodern feminist sensibility. Adler suggests that when faced with the paradoxes of acting competitively and collaboratively or morally and pragmatically, an effective negotiator requires a conceptual frame that is fluid, dynamic, and able to house a variety of bargaining rituals.¹⁶⁹ He writes: "He or she can dance the competitor's jitterbug, the collaborator's tango, the moralist's waltz, or the pragmatist's four step. One dance may be more comfortable than others, and the dances can be sequenced, but they are all in repertoire. The protean negotiator *adapts*."¹⁷⁰ While not framed in explicitly feminist terms, I can appreciate Adler's use of central metaphor, not the androgyne Hermaphroditus but the shapeshifter Proteus, who conceives of himself as performing any number of traditionally inconsistent, potentially confusing, and conceptually novel gender forms that may attend different bargaining orientations. "Like Proteus," Adler explains, "skilled negotiators . . . can undertake some kind of emotional and intellectual diagnostic, recalibrate expectations, and reflexively adjust their approach."¹⁷¹

Adler cites as inspiration the work of Robert Jay Lifton, a psychiatrist and historian who synthesized his observations about the human condition into what he called the "protean" style of self-process. Lifton treated mental health patients struggling to reinvent themselves in the context of social, cultural, and political upheavals, noting in his patients certain common threads: restlessness; constant flux; the persistent feeling of disconnection, dislocation, and displacement; intellectual and emotional rejection of orthodoxy; a sense of many-sidedness.¹⁷² His reflections are quite

¹⁶⁹ Robert Benjamin, *The Protean Sensibility: Reconsidering Approaches to Leadership and Negotiation*, Unpublished Paper, cited in Adler, *supra* note 15.

¹⁷⁰ Adler, *supra* note 15. [emphasis added]. I owe a credit to my first negotiation teacher, Fred Zemans, for introducing me to Adler's work during my studies at Osgoode Hall Law School.

¹⁷¹ *Id.* See also Nelken, *supra* note 164, at 7 ("A skillful negotiator, then, always has to consider the subject matter of the negotiation, the situation of the parties, and the styles of the other negotiators in deciding what negotiation style is the most likely to further her client's goals in a particular instance. Flexibility is the key to success in a variety of negotiations.").

¹⁷² ROBERT JAY LIFTON, *BOUNDARIES: PSYCHOLOGICAL MAN IN REVOLUTION* 37-44 (1st ed. 1970) ("[One patient] asked the question, 'Is there, or should there be, one face which should be authentic?' He wasn't really sure . . . He went on to compare himself to an actor on the stage who, as he put it, 'performs with a certain kind of polymorphous versatility,' . . . And he went on to ask, 'Which is the real person, so far as an actor is

remarkable, describing one patient's condition in terms that anticipate the poststructuralist deconstruction of the self¹⁷³ and Butler's deconstruction of gender and sexuality as exemplified by drag,¹⁷⁴ as a series of actor's masks that expose the performativity of social and cultural roles. Lifton goes on to describe his patients' self-process as a sort-of repeated rejuvenation, as a crossing and re-crossing of newly outmoded moral, ethical, and intellectual boundaries that increases their possibilities by enhancing "tactical leverage."¹⁷⁵ The process figures as both the means for survival and strategy for success in a rapidly evolving, increasingly globalized, and highly fragmented world:

Yet there is reason for believing that the present antipathy to total ideology is something more, that it is an expression of a powerful and highly appropriate contemporary style It is an effort to remain open, while in rebellion, to the

concerned? Is he more real when performing on the stage, or when he is at home? I tend to think that for people who have these many, many masks, there is no home. It is a futile gesture for the actor to try and find his real face?"'). Lifton founded his theory in three global historical developments after World War II: the world-wide sense of psycho-historical dislocation or disconnect between men and women and the symbols of their cultural traditions; the flooding of imagery produced by the flow of postmodern cultural influences over mass communication networks; and the kinds of physical and existential threat to the self that is associated with the breakdown of traditional boundaries of destruction in warfare. *Id.* at 44.

¹⁷³ Compare LIFTON, *supra* note 172, at 38 ("If we understand the self to be the person's symbol of his own organism, then, self-process refers to the continuous psychic recreation of that symbol.") with Butler, *Imitation and Gender*, *supra* note 11, at 18 ("For if the 'I' is a site of repetition, that is, if the 'I' only achieves the semblance of identity through a certain repetition of itself, then the I [sic] is always displaced by the very repetition that sustains it. . . . And if the 'I' is the effect of a certain repetition, one which produces the semblance of a continuity or coherence, then there is no 'I' that precedes the gender that it is said to perform; the repetition, and the failure to repeat, produce a string of performances that constitute and contest the coherence of that 'I.'"). Lifton emphasizes that his critique extends to all areas of human experience in advanced industrial society, "to the political as well as to sexual behavior, to the holding and promulgating of ideas, and to the general organization of lives." *Id.* at 45.

¹⁷⁴ LIFTON, *supra* note 172, at 45, 55 ("Everything he touches he mocks. 'Thingness' is pressed to the point of caricature. He is indeed artistically reborn as he moves freely among the physical and symbolic materials of his environment, but mockery is his birth certificate and his passport. This kind of duality of approach is formalized in the stated 'duplicity' of Camp, a poorly defined aesthetic in which (among other things) all varieties of mockery converge under the guiding influence of the homosexual's subversion of a heterosexual world."').

¹⁷⁵ *Id.* at 101.

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extraordinarily rich, confusing, liberating, and threatening array of contemporary historical possibilities—and to retain, in the process, a continuing capacity for shape-shifting.¹⁷⁶

Lifton's prophecy of an adapting, "shape-shifting," protean style later emerges in terms that presage Halley's understanding of the exploded list, which style he imagines as "an interminable series of experiments and explorations, some shallow, some profound, each of which can readily be abandoned in favor of still new psychological quests."¹⁷⁷ Built on such a foundation, protean negotiators are poised to succeed precisely because there is anti-identitarian complexity and chaos. As Lifton might describe, male and female negotiators should conceive of themselves as performance artists borrowing freely, impressionistically, and distortingly from their contemporaries as a means of finding their own way,¹⁷⁸ rebelling from fixed and total forms of ideology, M/F, to form a bargaining strategy that greatly enhances their tactical leverage.

More fundamentally, the protean negotiator model calls for a new referential system for relating men and women to themselves and to their counterparts at the bargaining table. Or, as Frances Olsen sought explicitly, it seeks a radical "departure from the ordinary image of males and females as correlatives" that permits alternative ways of theorizing negotiators' affective and productive lives.¹⁷⁹ In this new system, men and women should be encouraged to imitate shades on the full color spectrum that are equally valued and should be made accessible to every negotiator as interactional and institutional circumstances allow in our society for more than black and white and grey but, as Olsen famously said, for "reds and greens and blues"¹⁸⁰ and—again—many more.¹⁸¹ This locates an altogether different

¹⁷⁶ *Id.* at 98-99.

¹⁷⁷ *Id.* at 44 [emphasis added]. For further exploration of the concept of a "protean" self, see generally DAVID L. MILLER, *THE NEW POLYTHEISM: REBIRTH OF THE GODS AND GODDESSES* (1974); ROBERT JAY LIFTON, *THE PROTEAN SELF: HUMAN RESILIENCE IN AN AGE OF FRAGMENTATION* (1993); JAMES OGILVY, *MANY DIMENSIONAL MAN: DECENTRALIZING SELF, SOCIETY, AND THE SACRED* (1997); John A. Powell, *The Multiple Self: Exploring Between and Beyond Modernity and Postmodernity*, 81 MINN. L. REV. 1481, 1504 (1997).

¹⁷⁸ LIFTON, *supra* note 172, at 103.

¹⁷⁹ Olsen, *The Family and the Market*, *supra* note 93, at 1578. Olsen's vision may be the most well-known and controversial account of asymmetrical androgyny in the legal literature.

¹⁸⁰ *Id.*

¹⁸¹ I am not the first to explore this kind of "gender-freed" ideal of social, cultural, or legal activity. See, e.g., Warren, *supra* note 166, at 178-179 (arguing that the ideal of

figure than M or F, the shape-shifting gender-bender, at the base of its constitutive theory that derives an additional means of political resistance through the practice of principled negotiation.

C. *An Identity-Equivocal Politics*

The postmodern feminist critique does not lend itself to easy solutions. Critics of my work may argue that sex- and gender-hierarchical effects can and probably will occur where protean negotiation is practiced or taught, at least for a time. Protean negotiation may not be an immediately effective or complete strategy for correcting unfairness or inequality because men and women are not able to enact politically subversive expressions with the same costs and benefits.¹⁸² Taking this further, some critics may argue that my theory propagates an assimilationist discourse in the naïve or disingenuous chorus of “universal access” because male/masculine standards of negotiation behavior will remain intact if we fail to redeem the subordinated category of female/feminine before purporting to suspend, reject, or transcend sex/gender difference altogether.¹⁸³ Certainly, it is well-

asymmetrical androgyny is appropriate “with respect to feminine and masculine traits which are largely matters of personal style and preference and which have no little direct moral significance.”); West, *Jurisprudence and Gender*, *supra* note 91, at 72 (“Feminism must envision a post-patriarchal world, for without such a vision we have little direction. ... That vision is not necessarily androgynous; surely in a utopian world the presence of differences between people will be cause only for celebration. In a utopian world, all forms of life will be recognized, respected, and honored. A perfect legal system will protect against harms sustained by all forms of life, will recognize life affirming values generated by all forms of being.”); SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 171 (1989) (“A just future would be one without gender. ... In its social structures and practices, one’s sex would have no more relevance than ... the length of one’s toes.”); JAMES P. STERBA, *JUSTICE FOR HERE AND NOW* 80 (1998) (“[T]he traits that are truly desirable in society [must] be equally open to both women and men or, in the case of virtues, equally expected of both women and men.”).

¹⁸² The differential impacts on male and female gender-benders have been well-documented in a variety of social, cultural, and legal contexts. *Supra* note 47 and accompanying text regarding the professional woman’s “double bind.” Elsewhere, scholars have observed that courts in sex discrimination cases may be more sympathetic to women expressing non-femininity than men expressing non-masculinity. *See generally* Render, *supra* note 87, at 117-18.

¹⁸³ Many feminists have expressed concern that theoretical work done under the banner of “postmodern” or “queer” may seek to “trouble” the idea of gender difference but, in doing so, merely ignores or dismisses the real difference that gender makes. *See, e.g.,* Walters, *supra* note 135, at 845; Catharine A. MacKinnon, *Points against Postmodernism*, 75 CHI.-KENT. L. REV. 687 (2000). Christine Littleton succinctly

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documented that as a practical matter, there may be specific dangers to women for trying to assimilate or to undermine male and masculine forms in law and business.¹⁸⁴ It is also well-documented that many feminists have made brave and historic invocations of female/feminine identity under the representational regime M/F in the past, which have been powerfully transgressive in the dispute resolution context and elsewhere.¹⁸⁵ Following the critics' argument through, it would seem the real progressive politics of principled negotiation are manifested in the cultural feminist approach to gender, most likely, "fixing the system around the woman" as part of a strategic essentialist effort,¹⁸⁶ perhaps, to challenge the appeal of universalist humanism that threatens to erase the category "female/feminine" of its subversive potential.

These critics have a point. Even if I believe the postmodern feminist critique is more convincingly termed than this, all feminists should remain alive to "the open mesh of possibilities, gaps, overlaps, dissonances and resonances, lapses and excesses of meaning"¹⁸⁷ that are revealed as any deployments of power, including my recourse to alternative theories, are deconstructed.¹⁸⁸ I continue to struggle with my own concerns about

captures the objection that I am anticipating here: "[The social devaluation of "woman"] can be disrupted either by revaluing what women have been perceived to be, or by reassigning the attributes that comprise the social sexes, or both.. However, I am making a claim for one form of disruption rather than the other, based on my analysis of male power as a system. ... So long as equality analysis takes place in a system defined by the club, reassignment of social sex attributes must itself operate unequally." Littleton, *supra* note 92, at 1333-34.

¹⁸⁴ *Supra* notes 41-44 and accompanying text.

¹⁸⁵ *Supra* note 112 and accompanying text on cultural feminist deployments in ADR. See also, generally, Ann Shalleck, *The Feminist Transformation of Lawyering: A Response to Naomi Cahn*, 43 HASTINGS L. J. 1071 (1992). (assessing the feminization of the legal profession in light of women's ethic of care); Cohen, *An (Un)Useful Category*, *supra* note 10, at 170 (outlining the influence of difference feminists on the development of feminist legal education, consensual dispute resolution, and the "feminization of negotiation.").

¹⁸⁶ See Gayatri Chakravorty Spivak, *Subaltern Studies: Deconstructing Historiography* in *IN OTHER WORLDS: ESSAYS IN CULTURAL POLITICS* 197 (1987); Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense"*, 17 HARV. WOMEN'S L. J. 54 (1994) at n. 162.

¹⁸⁷ For Eve Kosofsky Sedgwick, the term "queer" referred to "the open mesh of possibilities, gaps, overlaps, dissonances and resonances, lapses and excesses of meaning when the constituent elements of anyone's gender, of anyone's sexuality aren't made (or can't be made) to signify monolithically." SEDGWICK, *TENDENCIES*, *supra* note 11, at 25.

¹⁸⁸ Here and throughout, I am trying to resist the temptation to prescribe postmodern feminist theory, or any theory for that matter, as universal and totalizing. See HALLEY, *SPLIT DECISIONS*, *supra* note 11, at 273.

assimilationist discourse. But these critics may also overstate their case in response to a threat that the protean mindset will lead to political “paralysis.”¹⁸⁹ Specifically, they might ask me how feminists can improve the lot of women if the social construction that organizes our efforts, the historically disadvantaged female/feminine negotiator, F, has been *disidentified* by critique.¹⁹⁰

A postmodern feminist thinker might frame the issue differently. Is it possible to comprehend, let alone organize around, the social constructions M and F, and to equalize the hierarchical relation $M > F$, without reinforcing sex-and gender-based stereotypes about negotiating behavior? Or could these identities and their associated behaviors be the product of those stereotypes? What if women, at once impressed by the imperative to identify with an unchanging image of their sex or gender assignment, influenced by male and masculine norms in the law and business boys’ club, and pressured by members of their profession who themselves had internalized stereotypes, begin to conceive of themselves in a limited way? What if celebrating the female or feminine as necessary constructions and fixing the system around their kinder, gentler referents are not unequivocally good things?¹⁹¹ Is

¹⁸⁹ See HALLEY, *SPLIT DECISIONS* *supra* note 11, at 187 (“But how can we seriously entertain Butler’s deconstruction of woman? For does it not deny the social existence of women, disable us from organizing on behalf of women, and lead to paralysis?”).

¹⁹⁰ The implications of feminist/queer/postmodern/poststructuralist approaches to this existential question have filled many volumes. See *generally* Eichner, *supra* note 11, and HALLEY, *SPLIT DECISIONS* *supra* note 11, at 106-273 (genealogizing the literature of feminism and postmodernism through the 1980s and 1990s). The critical threat of dissolving the category of “woman” has also been put directly. See *generally* Jacques Derrida, *SPURS* 49 (Barbara Harlow trans., 1978); Linda Alcoff, *Cultural Feminism Versus Post-Structuralism: The Identity Crisis in Feminist Theory*, 13 *SIGNS* 406 (1988). The strategic ramifications on women’s political organization have also been explored at length. See Biddy Martin, *Feminism, Criticism, and Foucault*, 27 *NEW GERMAN CRITIQUE* 3, 16-17 (1982); Misha Kavka, *Introduction* in BRONFEN & KAYKA, *supra* note 11, at ix-x; Martha Minow, *Incomplete Correspondence: An Unsent Letter to Mary Joe Frug*, 105 *HARV. L. REV.* 1096, 1104 (1992); Seyla Benhabib, *Feminism and Postmodernism: An Uneasy Alliance* in BENHABIB ET AL., *supra* note 11, at 20. See also, *generally*, JUDITH BUTLER & JOAN W. SCOTT, *FEMINISTS THEORIZE THE POLITICAL* (1992).

¹⁹¹ Judith Butler suggests that attempts to revalue upward the M/F binary risk adopting “the very models of domination by which we were oppressed, not realizing that one way that domination works is through the regulation and production of subjects.” See Judith Butler, *Contingent Foundations*, in BENHABIB ET AL., *supra* note 11, at 48. Wendy Brown raises a specific concern, that female or feminine identities galvanized in this way may “become [so] deeply invested in [their] own impotence” on account of real or perceived trauma, that feminists should seek deconstruction rather than revaluation. See

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reifying gender difference over and separate from other qualities always preferable to the creation of new social and cultural artifacts, theoretically accessible to all? What if the practice of protean negotiation could be similarly transgressive as some cultural feminist models?

At least in my view, anti-identitarian theories and identity-equivocal politics are not necessarily complicitous with sex and gender inequality. Exploring these potentialities, Foucault writes that discourse "can be both an instrument and an effect of power, but also a hindrance, a stumbling block, a point of resistance and a starting point for an opposing strategy."¹⁹² This characterizes Foucault's political projects that are drawn on a constantly shifting landscape that knows no single privileged place of power, M, whose removal will bring an unjust or unequal system tumbling down.¹⁹³ My hunch is that negotiations are determined periodically, but not permanently, by downward exercises of power-as-*puissance*, M over F, which means that stereotypically male/masculine traits and tendencies enacted as *pouvoir* will not necessarily leverage sex/gender hierarchy in all cases. This implies that principled negotiation standards are not inherently male/masculine but merely associated with men, that transgressive political activity may take a gendered feminine or masculine form, and that such activity may be enacted by women or men. By so defining our terms, protean negotiation is conceived as a postmodern *feminist* project that seeks to improve the welfare of a class of negotiating subjects that includes some cultural feminists' feminine woman, but reaches beyond to include the gender-bending masculine woman, the gender-bending feminine man, and—yes—even the masculine man, to the extent that no one's conduct is intrinsically oppressive

WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* 70-74 (1995).

¹⁹² FOUCAULT, *THE HISTORY OF SEXUALITY*, *supra* note 11, at 102 (emphasis added). Foucault describes the means of resistance to "relations of power" as appropriately mobile: in a "strategic situation," in "tactics," and in "practices of freedom." See Foucault, *The Ethics of the Concern for the Self*, *supra* note 144, at 282-284.

¹⁹³ In one of his most visionary moments, Foucault believed that a postmodern future would transcend traditional gender and sexual boundaries. See FOUCAULT, *THE HISTORY OF SEXUALITY*, *supra* note 11, at 5 (predicting "nothing less than a transgression of laws, a lifting of prohibitions, an irruption of speech, a reinstating of pleasure within reality, and a whole new economy in the mechanisms of power will be required."). See also Susan Stanford Friedman, *Beyond White and Other: Relationality and Narratives of Race in Feminist Discourse*, 21 *SIGNS* 1, 7 (1995) (calling the self a "script of relational positionality," defined as "[a] feminist analysis of identity as it is constituted at the crossroads of different systems of stratification ... acknowledging how privilege and oppression are often not absolute categories but, rather, shift in relation to different axes of power and powerlessness.")

or bankrupt, everyone has the capacity to shape-shift, and everyone is limited, albeit in different ways, by sex-and gender-based stereotypes about their bargaining behavior.¹⁹⁴

I would argue that through the discursive impacts of protean negotiation, gender-benders pose a challenge to traditional sex/gender conceptions that define and limit men and women at the bargaining table. Butler argues that drag performances are not necessarily subversive, but they may be depending on interactional and institutional receptions in which constitutive confusions can be fostered.¹⁹⁵ Wherever possible, she writes, “drag fully subverts the distinction between inner and outer psychic space and effectively mocks both the expressive model of gender and the notion of a true gender identity.”¹⁹⁶ The same can be said about protean negotiation. Michael Warner explains that “if queers, incessantly told to alter their ‘behavior,’ can be understood as protesting not just the normal behavior of the social but the *idea* of normal behavior, they will bring skepticism to the methodologies founded on that idea.”¹⁹⁷ It follows that if protean negotiators, incessantly told to alter their behavior, can be understood as protesting the very *idea* of “normal” sexed/gendered bargaining behaviors by conceiving themselves as outside the binary M/F, they will bring skepticism to the methodologies founded on that idea.

This is a potentially radical move. The more that traditional gender identities, M/F, are expropriated by protean negotiators who engage in gender-bending acts, the more that the notion of “men’s ways” of negotiation being superior to “women’s ways,” M > F, is shown to be artificial. And the more that this script is disrupted by experience on the ground, the more that it should motivate other people to engage in gender-bending acts at the expense of the traditional models which have historically disadvantaged women and gender-bending men in the law and business professions.¹⁹⁸ This

¹⁹⁴ This point has been made elsewhere, but without engaging the anti-identitarian critique of postmodern feminism and queer theory in a detailed way. See Menkel-Meadow, *Teaching about Gender*, *supra* note 18, at 361 (“The deconstruction of false gender labels is often just as empowering to men (who want to be collaborative and information sharing in negotiation without the stigma of being a negotiation ‘sissy’) as it is to women who are strong interest-maximizing competitors.”).

¹⁹⁵ BUTLER, *BODIES THAT MATTER*, *supra* note 11, at 125.

¹⁹⁶ BUTLER, *GENDER TROUBLE*, *supra* note 11, at 174.

¹⁹⁷ WARNER, *supra* note 11, at xxvii.

¹⁹⁸ This is inspired by a twofold motivation. The first is Joan Scott’s critique that politics deriving their authority in claims to “experience” largely ignore the ways that Foucault’s conception of discursive power-as-*pouvoir* may inform and are informed by this experience itself. See generally Joan W. Scott, *Experiences*, in *FEMINISTS THEORIZE THE POLITICAL* 22-40 (Judith Butler & Joan W. Scott eds., 1992). The second is Sharon

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should help us to reveal that sexual and gender hierarchy is a political invention rather than a "natural" or "necessary" fact, vitiating an ideological basis on which imbalances of bargaining power currently rest.¹⁹⁹ And if the hierarchy that underlies the subordination of women and gender-bending men is consistently challenged in this way, that organization may no longer be used to define sex/gender stereotypes about male/masculine and female/feminine behavior. If this assessment is correct, my postmodern feminist critique need not imply the paralysis of feminist identity politics. They may rest on different theoretical foundations, but to the extent they are united in political resistance to sex and gender inequality, I believe they are adjacent but allied, directed toward similar ends.

IV. CONCLUSION: NEGOTIATING RESISTANCE

My intent in writing is to start a conversation, to ask new and potentially redemptive questions about the progressive politics of gender in principled negotiation theory and practice. It is meant as a critique only, as a proposal that feminists question something and not that we replace one progressive politics with something else. This is borne of my intuition that even if cultural feminist and postmodern feminist negotiators share some unity of purpose, certain fundamental issues will remain in tension between them. Above all, parts of cultural feminism and postmodern feminism reflect firm, ideological commitments to competing discourses of "identity" and "activity" respectively, which found divergent methodologies for correcting the gender gap in bargaining behavior. On the one hand, women should assert their distinctive traits and tendencies as female/feminine, emphasize differences separating them from the rest of society, and seek to revalue these differences upwards on account of "real" women's unique gender *identity*. On the other hand, women should avoid identifications with the female/feminine that many experience as inaccurate or demeaning, emphasize similarities integrating them in the rest of society, and celebrate

Marcus's work on women's disruption and "explosion" of rape scripts that neither create nor result from immutable identities of the male oppressor and female oppressed. Sharon Marcus, *Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention*, in *FEMINISTS THEORIZE THE POLITICAL* 392 (Judith Butler & Joan W. Scott eds., 1992).

¹⁹⁹ This reasoning bears similarity to Catharine MacKinnon's argument that prohibitions on same-sex marriage constitute sex discrimination because the threat of same-sex sexuality in societies characterized by substantive inequality undermines sex- and gender-based stereotypes about men and women. See, e.g., MACKINNON, *SEX EQUALITY*, *supra* note 87, at 1067-68.

the unpredictable potential of all men and women to engage in protean acts.²⁰⁰

These theories give rise to a “radical and irreducible incoherence”²⁰¹ within feminist negotiation—what I call, the *Feminist Negotiator’s Dilemma*—and there may be no way to resolve it. While many reformers advocate for the pre-eminence of either discourse and routinely rely on strategic arguments founded in one or the other, they are in an intractable and dynamic impasse that cannot be pulled apart if we are to fully understand the role of gender in principled negotiation theory and practice. Lax and Sebenius make a similar point. It may be a mistake to assume two legitimate and historically opposing feminist views are not both strategically necessary when each view is incomplete and inadequate at resisting an unequal system on its own. We may need to upend the system with both arms.

Looking ahead, this should lead us to ask an important question. If both cultural feminists and postmodern feminists promote substantive equality as a normative ideal, and if both agree that unfairness and inequality in bargaining processes and outcomes are informed by legal and professional standards that historically favor “men’s ways” over “women’s ways” of negotiating, what might progressive feminist interventions in the negotiation field look like?

I would reject the simplicity of focal negotiator theories that see gender as an individual characteristic generated inside and determined by the

²⁰⁰ I offer four excellent discussions of the corresponding dilemma between cultural feminist and postmodern feminist approaches to gender difference that reach across disciplines, including proposals for a new feminist politics that, if not bridging their gaps, affirms and celebrates their ontological contradiction. See generally Alcoff, *supra* note 190; Eichner, *supra* note 11; Scott, *Deconstructing Equality-Versus-Difference*, *supra* note 167; Gruber, *supra* note 91.

²⁰¹ Eve Kosofsky Sedgwick argues that modern gay and lesbian movements are trapped in a “radical and irreducible incoherence” between prevailing and conflicting conceptions that define the current politics of our social and cultural organization. To illustrate on the level of homosexual definition, Sedgwick explains that a discourse is *gay-separatist* if it is *minoritizing*, meaning that it elevates gays and lesbians as an identifiable minority, underscoring differences separating them from the rest of society. Gay-separatist, minoritizing arguments generally track that there is a distinct population of persons who “really are” gay or lesbian on account of their unequivocal, immutable sexual *identity* or *status*. Contrasting with this, Sedgwick explains that a discourse is *gay-integrative* if it is *universalizing*, meaning that it regards gays and lesbians as part of the universal whole, underscoring similarities integrating them in the rest of society. Gay-integrative, universalizing arguments generally track that fixed sexual identities should be dissolved on account of the unpredictable and shared *potential* of all persons to engage in same-sex acts. See SEDGWICK, *EPISTEMOLOGY OF THE CLOSET*, *supra* note 11, at 85-90.

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negotiating subject only. I would avoid totalizing grand narratives and universal pronouncements about men, women, the masculine, and the feminine, and their identified traits and tendencies at the bargaining table. I would question the application of principled negotiation “best practices” and other professional credo that rely on uniform descriptions, general rules, and androcentric assumptions that narrow and normalize the expressive potential of male and female negotiators.

Instead, I would focus a more contextual approach to concrete issues in dispute resolution, tailoring negotiation practice and prescription to the specifics of a problem in ways that take account of relevant interactional and institutional circumstances. In all cases, I would ask and analyze how a negotiator’s group affiliations, intersectional identities, and diverse social, cultural, and professional conditions may play a part in determining bargaining behavior and outcomes. I would remain open to initiatives that revalue upward so-called “female/feminine” negotiation traits and tendencies as part of a strategy to reform gender hierarchical legal structures, but do so without advocating for the use of “female/feminine” tactics at all times, without essentializing or moralizing about women’s experience, and perhaps without associating these tactics with women or femininity at all. I would embrace the use of a more directed negotiation pedagogy that encourages students to decipher their experiences with legal and business cultures through a gender lens, applying feminist theory in strategic political deployments, in critical self-reflection, in deconstruction of gender stereotypes, in sustained evaluation of professional and ethical standards, and in pleas for greater fairness and equality in bargaining processes and outcomes between women and men everywhere.

These interventions attempt to marry my activism and skepticism, to inspire a “protean feminist” politics of gender in negotiation that may have greater transgressive potential than cultural feminist or postmodern feminist negotiation alone. But they are only an attempt. There may be no easy convergence that is both effective in practice and pedagogy, at least at all times, and capable of resolving this dilemma in theory. I think we may be left to negotiate its resistances. Feminist negotiation is not as stable or as static as previously thought. This may be precisely what gives it its power.²⁰²

²⁰² For my framing of the Feminist Negotiator’s Dilemma, I owe a credit to Richard Ford’s treatment of an analogous “double bind” in the racial politics of difference. See Richard Ford, *Beyond “Difference”: A Reluctant Critique of Legal Identity Politics*, in *LEFT LEGALISM/LEFT CRITIQUE* 57, 75 (Wendy Brown & Janet Halley eds., 2002).

